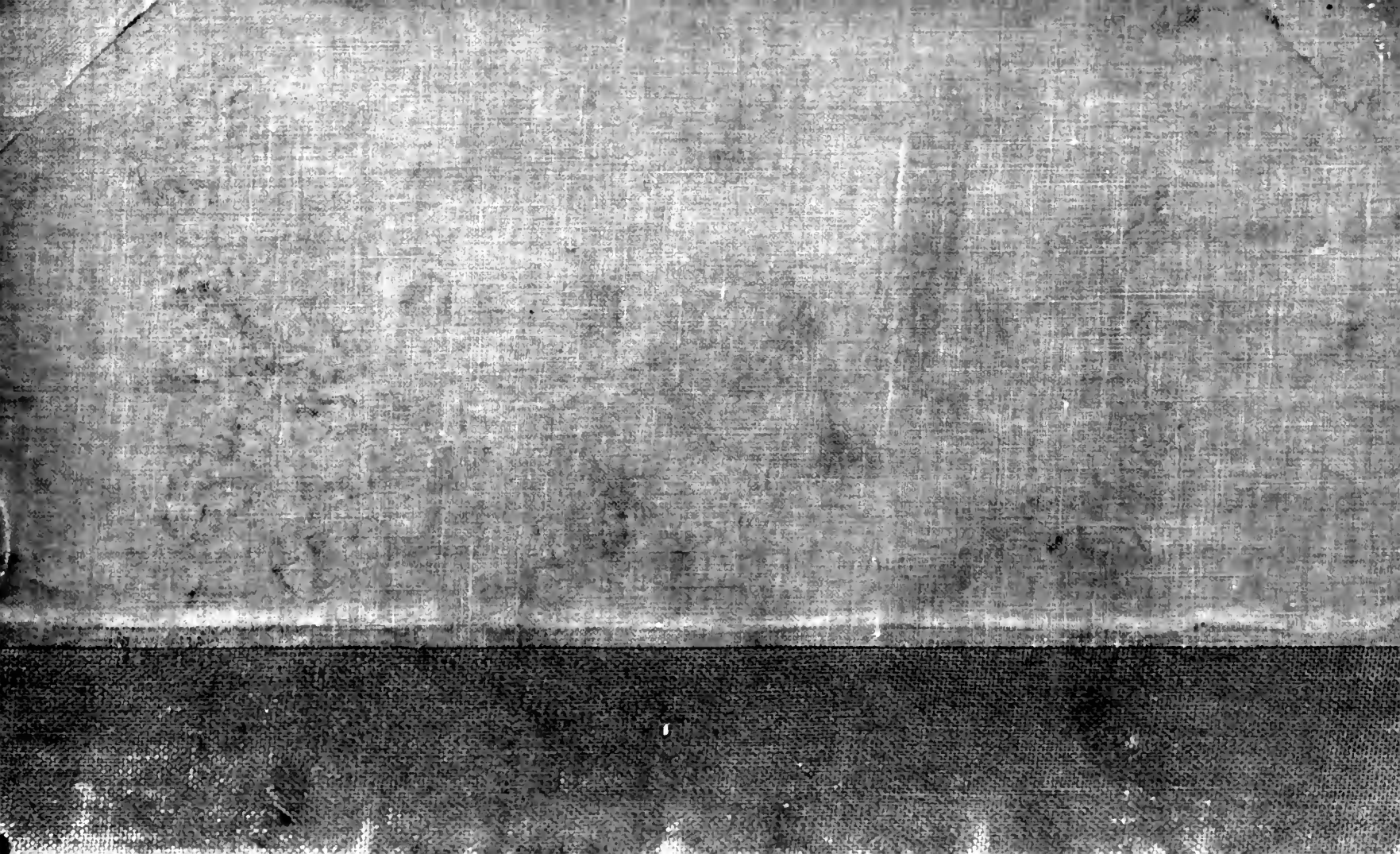

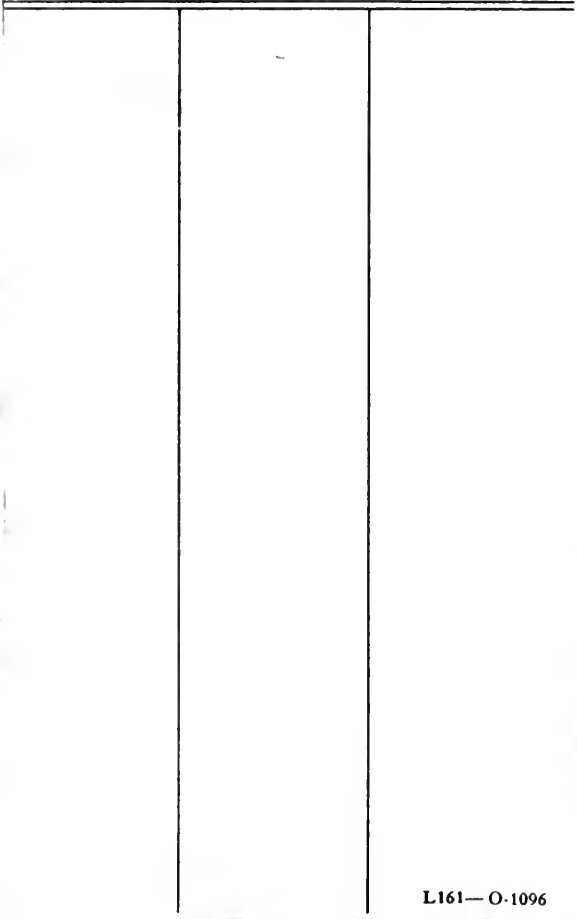

THE

LAW OF RAILWAYS:

EMBRACING

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

BY

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PREFACE.

We have taken pains, in the present edition, to insert, as far as practicable, all the parallel references, where the same case is found in different reports, which, in regard to many of the English cases, will be of great convenience, where the different series of reports are not always accessible.

We have also added to the present edition an appendix of the latest decisions, down to the time of publication, in which are embraced some few cases of an earlier date, not before referred to. We believe the edition will now be found to embrace the points decided in, and references to, all the important cases, and nearly all which have been determined, both English and American, upon the numerous topics discussed.

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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COMMON CARRIERS.

COMMON CARRIERS.

INTRODUCTION.

1. *Distinction between public or common and private carriers.*
2. *The distinction further illustrated by the cases.*
3. *The precise definition of common carriers.*
4. *Reference to the early cases.*

n. 7. *Different kinds of bailment.*

5. *Consideration of the more recent cases.*

We have not deemed it important to go much into detail in defining the different classes of carriers. The distinction between common carriers and all other carriers is all that seems entirely pertinent to a treatise upon the subject of common carriers. The distinction between common or public carriers, and such as are merely private carriers, has been already hinted at, and is sufficiently defined below for ordinary practical purposes. But the distinction is further illustrated in numerous cases in the English and American reports.

1. It is generally considered that where the carrier undertakes to carry only for the particular occasion, *pro hac vice*, as it is called, he cannot be held responsible as a common carrier. So, also, if the carrier be employed in carrying for one or a definite number of persons, by way of special undertaking, he is only a private carrier. To constitute one a common carrier he must make that a regular and constant business, or at all events, he must * for the time, hold himself ready to carry for all persons, indifferently, who choose to employ him.[1]

2. In an American case,[2] a common carrier is defined to be one who undertakes for hire or reward to transport from place

[1] Gisbourn *v.* Hurst, 1 Salk. 249; Upston *v.* Slark, 2 C. & P. 598; Gilbart *v.* Dale, 1 Nev. & Per. 22.

[2] Dwight *v.* Brewster, 1 Pick. 50.

to place the goods of such as choose to employ him. It need not be his principal business, but merely incidental to other occupations, as when the proprietors of a stage-coach, whose chief business was to carry passengers and transport the mail, allowed the driver to carry parcels not belonging to the passengers, it was held to constitute them common carriers, and as such liable for the loss of a parcel thus committed to their agents. This, we apprehend, is the general rule in regard to stage-coach proprietors. They are regarded as common carriers, and that the act or agreement of the driver, within the range of the business which he is knowingly allowed to transact, will bind the proprietors.[3]

3. To constitute one a common carrier, then, he must make it, for the time, a regular employment to carry goods for hire for all who choose to employ him.[4] The rule embraces the proprietors of stage-wagons and coaches, omnibuses and railways.[5] The rule will also embrace carters, expressmen, porters, ship-owners, and all who engage regularly in the transportation of goods or money, either from town to town, or from place to place in the same town.

4. The definition of a common carrier requires that the service should be for hire or reward, since without that the same degree of responsibility would not arise. But in regard to private contracts for carrying goods or money, it is not important, after the thing is actually undertaken, whether it be for hire or not. That was the point decided * in the celebrated and leading case of Coggs *v.* Bernard,[6] where it was ruled that if one undertake to carry goods safely and securely, he is responsible for the damages they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage. The opinion of *Holt*, Ch. J., in this case, forms the basis of the present law of bailments, both in this country and in England.[7]

[3] F. & M. Bank *v.* Ch. Transp. Co., 23 Vt. 186.

[4] Fish *v.* Chapman, 2 Kelly, 349, 353.

[5] Story, Bailm., § 496, and cases cited.

[6] 2 Ld. Ray. 909; s. c. Com. 133.

[7] *Holt*, Ch. J. There are six sorts of bailments. 1. *Depositum;* or, the mere deposit of goods to keep without benefit or reward. 2. *Commodatum*, where goods are loaned to one for his convenience. 3. Loaning for hire. 4. Pawn or pledge. 5. Goods to be carried or repaired for reward. 6. For the same purpose without reward. It was decided in Shaw *v.* Davis, 7 Mich. 318, that a contract for rafting and running staves does not constitute the party

5. There has arisen in the American courts considerable controversy in regard to what precise form of transportation of goods will be sufficient to constitute one a common carrier. But it has been held that railways which take a car for transportation over their road, and take the sole possession and care of it, although it remain on the owner's trucks, are responsible as common carriers.[8] And in general the same rule is established here as in England, that those who are engaged in the business of carrying for all who apply, indiscriminately, upon a particular route, by whatever mode of transportation they conduct their business, must be regarded as common carriers ; while those who undertake to carry in a single instance, for a particular person, not being engaged in the business as a general employment, even for a portion of the time, must be considered private carriers,[9] and as such are only liable for the care and diligence which careful and diligent men exercise in their own business of equal importance.[9]

a common carrier, but only an ordinary bailee for hire, which requires ordinary care and diligence.

[8] New Jersey Railw. *v.* Pennsylvania Railw., 3 Dutcher, 100.

[9] Pennewill *v.* Cullen, 5 Harring. Del. 238. See Dwight *v.* Brewster, 1 Pick. 50. The owner of a vessel usually employed in transporting goods from one port of the United States to another, is a common carrier. Clark *v.* Richards, 1 Conn. 54.

*CHAPTER XXVI.

COMMON CARRIERS.

SECTION I.

Duty at Common Law. — Rule of Damages in case of breach of duty.

1. *Definition of the responsibility of common carriers. Inevitable accident.*
2. *To excuse carrier, force must be above human control, or that of public enemy.*
3. *Are insurers against fire, except by lightning.*
4. *Instances of perils which excuse carriers.*
5. *If carrier expose himself to perils, he must bear the loss, but not of delay, from unknown peril.*
6. *Is liable for loss in price, during delay caused by his fault.*
7. *Only actual damages can be recovered.*
8. *The same view further illustrated.*
9. *In America the rule of damages is more liberal.*
10. *Carrier must pay damage caused by negligence.*
11. *Carrier bound to follow instructions whether given at the time or before delivery.*
12. *Express carriers who undertake to sell commodities intrusted to them, are common carriers of the money received.*
13. *Usage to collect and return price will bind carriers.*

§ 167. 1. CARRIERS of goods for hire indifferently for all persons, such as we have defined as common carriers, have, at common law, for a very long time, been held liable for all damage and loss to goods during the carriage, from whatever cause, unless from the act of God, which is limited to inevitable accident, or from the public enemy.[1] The exception of the act of God, or inevitable accident, * has by the decisions of the courts been restricted to such narrow limits, as scarcely to amount to any re-

[1] This will not of course embrace losses caused by any default of the owner of the goods. The American cases adopting substantially this definition are very numerous. See Harrell *v.* Owens, 1 Dev. & Batt. 273; Moses *v.* Norris, 4 N. H. 304; Jones *v.* Pitcher, 3 Stew. & P. 135; Sprowl *v.* Kellar, 4 id. 382; Hale *v.* N. J. Steam Nav. Co., 15 Conn. 539.

It is no excuse for the carrier that a greyhound delivered to him, and for which he gave a receipt, was not properly secured at the time of delivery. He was bound to know what was proper fastening, and advise the owner if any thing more was required. Stuart *v.* Crawley, 2 Stuart, L. C., 323. See also Porterfield *v.* Humphreys, 8 Humph. 497, where a horse was lost on a steamboat, by escaping from his fastening; and the carrier was held responsible.

lief to carriers. It is in reality limited to accidents which come from a force superior to all human agency, either in their production or resistance. Hence many learned judges have contended that the terms "inevitable accident," which were first suggested by Sir William Jones as a more reverent mode of expressing the act of God, do not, in fact, have the same import.[2]

2. To excuse the carrier, the loss must happen from a strictly superior force, and not a mere human force (unless it be the public enemy), the *vis major* of the civil law, and the casuists. And it would seem that it should not only be a superior force, in the emergency, but one which no human foresight or sagacity could have guarded against.[3] * In one case,[4] where the subject

[2] Forward *v.* Pittard, 1 T. R. 27. The language of Lord *Mansfield* is here so pertinent as to bear repetition: "It appears from all the cases for one hundred years back, that there are events for which the carrier is liable, *independent of his contract*." "A carrier is in the nature of an insurer." In defining the act of God, he says: "I consider it to mean something in opposition to the act of man." — "The law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests." Richards *v.* Gilbert, 5 Day, 415; McArthur *v.* Sears, 21 Wend. 190, 192; Proprietors of the Trent & Mersey Nav. Co. *v.* Wood, 3 Esp. Cases, 127, 131; 4 Doug. 287 (26 Eng. C. L. R. 358). Lord *Mansfield* here says: "The act of God is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident." See Sherman *v.* Wells, 28 Barb. 403; Fergusson *v.* Brent, 12 Md. 9. *Le Grand*, Ch. J.: "The act of God" must be the direct and immediate cause of the loss, to excuse the common carrier, and it is no excuse that it was caused by inevitable accident, or produced by the act of God concurring with other agencies. Sprowl *v.* Kellar, 4 Stew. & P. 382. But see Hill *v.* Sturgeon, 28 Mo. 323. In a somewhat recent case, Read *v.* Spalding, 5 Bosw. 395; s. c. 30 N. Y. 630, where goods were damaged by a flood rising higher than ever before, and which it was no negligence not to have anticipated, and from which the goods could not be delivered after the extent of the rise was known, it was held to have occurred by the act of God, unless the carrier was in fault in not having sooner sent the goods to their destination, and if so in fault, then he was responsible. S. P. Michaels *v.* N. Y. Centr. Railw., 30 N. Y. 564. See also Merritt *v.* Earle, 29 N. Y. 115.

[3] Colt *v.* McMechen, 6 Johns, 160; Opinion of *Kent*, Ch. J.; 1 Smith's L.

[4] Blackstock *v.* New York & Erie Railw., 1 Bosw. 77. But see also Cox *v.* Peterson, 30 Alab. 608; Hibler *v.* McCartney, 31 Alab. 501. There is no invariable rule requiring common carriers to carry freight in the precise order in which it is received, without regard to any other circumstances connected with its character, condition, or liability to perish. Peet *v.* Chicago & N. W. Railw., 20 Wis. 594.

was very carefully examined, it was held that the carrier could not excuse himself for delay in transporting goods by showing that the engineers, and other persons in the employ of the company, by combination left their employ and rendered it impracticable to complete their undertaking. Such a result is not to be regarded as the act of God or inevitable accident.

3. Hence carriers are held as insurers against fire, unless caused by lightning.[5] There are many cases in the books which take such a latitudinarian or speculative view of the extent of injuries by the act of God, as to give * the exception a much broader range, as where the foundering of a ship upon a rock in the ocean, not generally known to navigators, and not known to the master, was held a loss from the act of God.[6] And if a vessel strike on a rock not hitherto known, it will excuse even common carriers, it has been said, but not if it be laid down in any chart.[7]

Cases, 219, ed. 1847; 268, ed. 1852, and the able note of the Am. editor; McArthur *v.* Sears, 21 Wend. 190; McCall *v.* Brock, 5 Strob. 119; Dale *v.* Hall, 1 Wilson, 281; N. B. Steamboat Co. *v.* Tiers, 4 Zab. 697. Where the loss of goods on board a ship occurred in consequence of the rudder proving defective, internally, from some cause unknown to the owner or master, and where the vessel had been "lately completely repaired," it was nevertheless held the carrier was liable. Backhouse *v.* Sneed, 1 Murph. 173. And in all cases the owners of river craft are responsible, not only for their own inattention, want of care, and inexperience, but equally for that of their servants. Borne *v.* Perrault, Stuart, L. C. 591, and note. And even where the goods were on board a lighter, being conveyed to the vessel outside the harbor, and were thrown into the water and damaged by an explosion of the boiler, the vessel was held responsible for the loss, these particular goods being included in the bills of lading signed by the master. Bulkley *v.* Naumkeag Cotton Co., 24 How. U. S. 386. This case goes upon the ground that the usages of the business requiring the owner of the vessel to employ and pay the lighterman, the delivery to him was a delivery to the master, and the responsibility of common carrier attached thereupon. And the responsibility of a ferryman as a common carrier for carriages, attaches as soon as the same are fairly on the slip or drop of the ferry; and it will not relax on account of the carriage being driven by a servant of the owner. Cohen *v.* Hume, 1 McCord, Law, 439.

[5] Mershon *v.* Hobensack, 2 Zab. 372, 379; Forward *v.* Pittard, 1 T. R. 27; Hyde *v.* Trent & Mersey Nav. Co., 5 T. R. 389; Gatliffe *v.* Bourne, 4 Bing. N. C. 314. And in Ins. Co. *v.* Ind. & Cin. Railw., Disney, 480, it is held, that in losses by fire the carrier is *prima facie* liable. See also Porter *v.* Chicago, &c. Railw., 20 Ill. 407; Parker *v.* Flagg, 26 Me. 181.

[6] Williams *v.* Grant, 1 Conn. 487.

[7] Pennewill *v.* Cullen, 5 Harring. Del. 238. And in Collier *v.* Valentine, 11 Mo. 299, it is said that losses from obstructions in river navigation, where no re-

4. And so of the loss of a vessel by running upon a * snag in a river, brought there by a recent freshet.[8] But these cases have been questioned, and perhaps have not been universally followed. A hurricane or tempest, lightning, and the unexpected obstruction of navigation by frost, have been held to come within the exception to the liability of carriers.[9]

liable chart exists, are not governed by the same rules as losses by ocean navigation, where such is the fact. But in the former each case must be judged by its own peculiar circumstances. But it is no excuse for the loss of goods by a common carrier, that his vessel was run into by a steamer in the night and sunk, whereby the goods were lost, provided those in charge of her had not used due care in guarding against such an accident, even where the persons in charge of the steamer were guilty of negligence in her management. Converse *v.* Brainard, 27 Conn. 607. If the fault were solely on the part of the colliding vessel, the carrier is still responsible. Oakley *v.* Portsmouth & Ryde Steam Packet Co., 11 Exch. 618.

In the case of De Rothschild *v.* Royal Mail Steam Packet Co., 7 Exch. 734, where the carrier received goods in Panama to be by him delivered in London, "the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, roads, and rivers, or any or either of the risks so excepted as aforesaid;" and the goods were secretly stolen from a railway truck in passing from Southampton to London, it was held not to come within the exceptions of loss by robbers or the danger of the roads. Since robbers meant those who take by violence in opposition to thieves who take covertly, and dangers by roads meant marine roads, or if it could apply to roads by land, it would only embrace perils peculiar to roads, as the overturning of carriages in rough and precipitous places, &c. It was held, at an early day, that carriers by water could not excuse themselves for loss occasioned by coming in contact with an anchor, to which no buoy appeared to be fastened. Trent Nav. *v.* Wood, 3 Esp. 127. And where damage was done to the goods by water escaping from a steam-pipe cracked by frost, by reason of filling the boiler over night, the carrier is not excused; for although that had been the common usage, it was the fault of the crew. Siordet *v.* Hall, 4 Bing. 607; s. c. 1 M. & P. 561. It is no excuse that the goods were lost by an accidental fire without the fault of the carrier. Gilmore *v.* Carman, 1 Sm. & M. 279; Potter *v.* Magrath, Dudley, 159. Theft by the crew or others is no excuse. Schieffelin *v.* Harvey, 6 Johns. 170. And even where the loss occurs by the shifting of a buoy at the entrance of the harbor while the ship was absent on her last voyage, it will not excuse the carrier. Reaves *v.* Waterman, 2 Spears, 197.

[8] Smyrl *v.* Niolon, 2 Bailey, 421; Faulkner *v.* Wright, 1 Rice, 108.

[9] Bowman *v.* Teall, 23 Wend. 306; Parsons *v.* Hardy, 14 id. 215; Harris *v.* Rand, 4 N. H. 259; Crosby *v.* Fitch, 12 Conn. 410. It has been held, that although a general bill of lading, given by a carrier, containing a general undertaking to carry, is subject, presumptively, to the ordinary exception to the liability of the carrier, of the act of God and the public enemy, it may nevertheless be shown, by oral testimony, that the undertaking was not even subject

5. And ordinarily, where the negligence of the carrier exposes him to what he might otherwise have escaped, he is responsible for losses thus occurring through the combined agency of his own negligence and inevitable accident, or the public enemy. As where the carrier, without * necessity or justifiable cause, deviates from the direct or usual course of transportation, and thereby encounters a storm in which water communicates with the cargo, lime, and ignites it, whereby both ship and cargo are lost, he is responsible upon a declaration charging that it was his duty to carry by the usual course without needless deviation.[10] But if his own neglect was not the proximate cause of the peril being incurred, or if the neglect was not one which ordinary foresight or sagacity could have apprehended was exposing the goods to extraordinary peril, he is still excused. As, if by having a lame horse he is longer upon his route, and is thus overtaken by a desolating flood upon the canal, he is not responsible for the consequent loss.[11]

to that presumptive exception. Morrison *v.* Davis, *infra*. But, query, whether this legal intendment of the bill of lading is any more subject to explanation and contradiction than are the express provisions of the instrument itself. The carrier must show that the loss or damage accrued from causes within the exceptions to his responsibility, created either by law or the contract of the parties. Cameron *v.* Rich, 4 Strobh. Law, 168. And even where the vessel is unseaworthy, or the carrier is otherwise in default, he is not responsible for losses accruing from causes excepted from his undertaking, and in no sense from any defect or default on his part. Collier *v.* Valentine, 11 Mo. 299. Exceptions of the dangers of the river only cover such as are not known, and therefore unavoidable by human care and foresight. Gordon *v.* Buchanan, 5 Yerg. 71.

Loss by pirates is regarded as a loss by the public enemy. Magellan Pirates, 25 Eng. L. & Eq. 595; s. c. 18 Jur. 18. See Bland *v.* Adams Ex. Co., 1 Duvall, 232. The freezing of perishable articles by reason of an unusual intensity of cold is not such an intervention of the *vis major* as excuses the carrier, if the accident might have been prevented by the exercise of due diligence and care upon his part. The fact that the carrier has done what is usual, is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances. Wing *v.* The New York & Erie Railroad Company, 1 Hilton, 235. So, where goods are thrown overboard in a tempest, by order of the master. Gillett *v.* Ellis, 11 Ill. 579. The master of a steamboat is not liable, for not drying wheat wet by inevitable accident. Steamboat Lynx *v.* King, 12 Mo. 272. There is no such invincible necessity that goods carried by wagon should suffer by rain as to excuse the carrier for damage thereby. Philleo *v.* Sandford, 17 Texas, 227.

[10] Davis *v.* Garrett, 6 Bing. 716; s. c. 4 M. & P. 540; Powers *v.* Davenport, 7 Blackf. 497; Lawrence *v.* McGregor, Wright, 193.

[11] Morrison *v.* Davis, 20 Penn. St. 171, 175.

6. But where a delay in the transportation is caused by inevitable accident, a railway company is liable for injury to the goods, by bad handling, in endeavors to expedite the passage. But it is not liable, of course, for a decline in the price of goods during a delay which was inevitable.[12] But where the decline in price happened during a delay in transportation for which there was no legal excuse, the carrier would, no doubt, be liable. And in an action for not delivering goods in a reasonable time, the party is entitled to recover the value of the goods at the time and place where they should have been delivered, and necessary loss and expenses incurred otherwise, if any.[13]

* 7. The rule of damages, as laid down by the Court of Exchequer in a late case[14] is, that where the carrier fails to deliver in time it is the duty of the owner to sell, directly he receives the goods, at the market prices, and realize his loss; and the difference between the price which he obtains, and that which he would have obtained if the goods had been delivered in time, is the only meas-

[12] Lipford *v.* Railw. Co., 7 Rich. 409; Galena & Chicago Railw. *v.* Rae, 18 Ill. 488: Denny *v.* N. Y. Central Railw., 13 Gray, 481. And when the cause of delay, as ice or low water, is removed, the duty to transport revives. Lowe *v.* Moss, 12 Ill. 477; *post*, §§ 188, 190.

[13] Nettles *v.* Railw. Co., 7 Rich. 190; Black *v.* Baxendale, 1 Exch. 410; *post*, §§ 188, 190.

Where cotton is lost by a common carrier, interest upon its value may be assessed by the jury as a part of the damages, in an action against the carrier for the loss. Kyle *v.* Laurens Railw., 10 Rich. 382.

In estimating the damages in an action against the carrier for the loss of the cotton which he undertook to deliver to plaintiff's factors in Charleston, the amount of factors' commissions upon the value should not be allowed the defendant in abatement. Ib.

The carrier is bound to carry in a reasonable time, but this is a question of fact, under all the circumstances, and to be submitted to the jury. Conger *v.* Hudson River Railw., 6 Duer, 275. But it is said here that the carrier is not responsible for delay caused by the fault of a third party, as a collision with the train of another railway through their neglect. Nor is the company liable for damages occasioned by the loss of a market through delay not excused, this being too speculative and contingent. But most of the cases hold otherwise. See Falway *v.* Northern Transportation Co., 15 Wis. 129, where it was held that a delay in the transportation of goods to Buffalo, from which place they were to be shipped by steamers on the lake, occurring in November, was, in view of the increased dangers of lake navigation as winter approached, *prima facie* proof of negligence.

[14] Simmons *v.* Southeastern Railw. Co., 7 Jur. N. S. 849; s. c. 7 H. & N. (Am. ed.) 1002.

ure of damages. This was a case where hops were sent by common carrier, and the consignee refused to accept them on account of not being delivered in time; and the court held the plaintiff could recover no damage on account of the loss of the bargain between the plaintiff and the consignee.

8. And in another case where goods were not received by the consignee until after the season of their sale had passed, it was held the plaintiff could only recover the difference between the market value of the goods at the time they were received and when they should have been received, and that the profits which the plaintiff would have derived from making up these goods into articles of sale and disposing of them could not be taken into account.[15]

9. But in an action for not delivering machinery in proper time, the measure of damages was held to be the * value of the use of the machinery during the period of its improper detention,[16] but that under proper averments and notice and proper proof special damages even beyond this might be recovered.[16] The difference between the last case and some of the preceding, in regard to the rule of damages, seems to be one of policy between the views of the English and American courts, in the one case to enable the owner to realize speculative damages, and in the other to deny all but what is the most obvious actual damage.

10. And where the cars of a railway company are thrown off the track, by reason of running over one who fell from the train in consequence of having no proper place to stand, it is no excuse for any injury caused to freight.[17]

11. Carriers of goods by express or otherwise, are always bound to follow instructions given by the owner or his agent, unless that becomes reasonably impracticable. And instructions given antecedently to the delivery of the goods, but in contemplation of such delivery, on the part both of the owner and carrier, are of the same binding force as if given at the very time of the delivery.[18]

12. And where carriers by express undertake to dispose of com-

[15] Wilson *v.* Lanc. & Yorksh. Railw. Co., 7 Jur. N. S. 862; s. c. 9 C. B. N. S. 632.

[16] Priestly *v.* Northern Ind. & Chicago Railw. Co., 26 Ill. 205; *post*, §§ 188, 190.

[17] Goldey *v.* Penn. Railw. 30 Penn. St. 242.

[18] Streeter *v.* Horlock, 7 Moore, 283; s. c. 1 Bing. 34.

modities intrusted to them, and return the price, they must be regarded as common carriers of the money as well as the goods, and are not relieved of their extreme responsibility upon the receipt of the money, unless there is some contract or understanding allowing them to use the money, and if so, they would become debtors for it upon the receipt of it.[19]

13. So also, where goods are sent by express, with * directions to collect the price on delivery, as where the receipt for the goods, signed by the agent of the company, was marked, "356.34, C. O. D.," which the agent testified meant that the company undertook to collect $356.34, on delivery of the goods, and return the amount to the consignors, it was held the evidence was admissible, and the company bound by the act of their agent.[20] But it has sometimes been doubted whether the master of a ship can bind the owners to return the price of commodities shipped, unless there is a usage to that effect.[21] But such a usage is not uncommon, and will ordinarily bind the owner to such an undertaking on the part of the carrier, although made by his servants.[22]

*SECTION II.

Railway Companies Common Carriers.

1. *Railway companies and others who carry for all who apply are common carriers.*
2. *Under the English Statute entitled to notice of claim.*
3. *Railways also made liable as common carriers of passenger's baggage and of freight.*
4. *Responsibility results from the office, and action may be in tort or contract.*

§ 168. 1. It was decided at an early day that persons assuming to carry goods upon railways for all who applied, were to be held as common carriers, and indeed it is now regarded as an elementary principle in the law that all who carry goods, in any mode, for all who apply, are common carriers.[1] * And if natural persons have

[19] Harrington *v.* McShane, 4 Watts, 443; Kemp *v.* Coughtry, 11 Johns. 107; Gallaway *v.* Hughes, 1 Bailey, 553. See Emery *v.* Hussy, 4 Greenl. 407; Moseley *v.* Lord, 2 Conn. 389.

[20] American Express Co. *v.* Lesem, 39 Ill. 312.

[21] Taylor *v.* Wells, 3 Watts, 65.

[22] Galloway *v.* Hughes, 1 Bailey, 553.

[1] Parker *v.* Great Western Railw., 7 Man. & G. 253; Muschamp *v.* Lancaster Railw., 8 M. & W. 421; Palmer *v.* Grand Junction Railw. Co., 4 M. & W.

the management and control of a railway, as receivers appointed by a court of equity, they are responsible as common carriers, if they hold themselves out as such, the same as the corporation would have been before it was placed in the hands of receivers.[2] And a street railway corporation will be responsible as common

749; Pickford *v.* Grand Junction Railw., 12 M. & W. 766; Eagle *v.* White, 6 Whart. 505; Weed *v.* S. & S. Railw. Co., 19 Wend. 534; Camden & Amboy Railw. Co. *v.* Burke, 13 id. 611; Story on Bailments, § 500; Angell on Carriers, § 78. In the case of Fuller *v.* The Naugatuck Railw., 21 Conn. 570, it is said that in order to charge railways as common carriers, it is not necessary to allege that they had power under their charter to become common carriers; but that having assumed the office and duty of common carriers of freight and passengers, they are thereby estopped to deny their obligations, therefrom resulting, by falling back upon any limited construction of their powers under their charter. But a railway may become a common carrier of goods, and not in consequence be necessarily responsible for money or bank-bills. That depends on their own usage or consent. C. & A. Railw. *v.* Thompson, 9 Ill. 578; Allen *v.* Sewall, 2 Wend. 327. The same rule of construction in regard to the liabilities of railways was adopted in Welling *v.* The Western Vermont Railw., 27 Vt. 399, and in Noyes *v.* The Rutland & Burlington Railw., 27 Vt. 110. The citation of cases under this head might be multiplied almost indefinitely. In Jones *v.* Western Vermont Railw., 27 Vt. 399, it is laid down as the governing principle of the case, that the company are liable even for torts committed by their agent or servants, within the apparent scope of their authority, or in the pursuit of the general purpose of the charter, and where the departure from the general scope of the charter powers is not such as to be notice to all, that the agent is departing from the proper business of the corporation. One of the three last was a case where the railway company so constructed an embankment as to serve the purpose of a dam to create a reservoir for the accommodation of the mill-owners below, whereby the company obtained some indirect advantage in regard to compensation to land-owners, through whose land they were constructing the embankment. The embankment was so defectively constructed, that it yielded to the pressure of the water, and caused damage to the proprietors below, by the sudden outbreak of the waters, and the company were held liable for the injury thereby sustained.

In England, it is not uncommon to convert railway structures, by means of additions, into stables, and even dwelling-houses, which the company let to tenants. Such buildings, although subject to the poor-rate, are not regarded as under the supervision of the metropolitan surveyors of buildings, as to fire, party-walls, roofs, and the right to order buildings pulled down, forming, as they do, an important and indispensable portion of the railway structures. N. Kent Railw. *v.* Badger, 30 Law Times, 285; s. c. *nom.* Badger in re, 8 El. & Bl. 728; Russell *v.* Livingston, 19 Barb. 346; s. c. 16 N. Y. 515.

[2] Blumenthal *v.* Brainerd, 38 Vt. 402. A receiver may be protected from an action at law by the order of the court of equity appointing him; but otherwise he is liable the same as if he were not a receiver. Ib.

carriers, if they allow their drivers and conductors to take, carry, and deliver trunks and parcels for hire. And what is done by the conductors with the knowledge and consent, express or implied, of the superintendents, will bind the company.[3] Steamboats which carry freight and parcels for all who apply, are responsible as common carriers.[4] And a wagoner who does the same, is responsible as a common carrier, even when he does not make that his regular and principal business.[5] And where one employed his boat to carry his own cotton, and occasionally carried that of his * neighbors, it was held he was responsible as a common carrier, and bound by the act of his captain in taking freight, although applications for that purpose were usually made to himself.[6] So a boatman employed in the transportation of property on the canals, is a common carrier.[7] And public ferrymen are regarded as common carriers.[8] One who holds himself out as a common carrier, ready to undertake for all who call, is a common carrier on his first trip, as much as after his business has settled into a fixed usage.[9] But one who is employed with his ship to carry a single load of grain for an agreed price, and who had not offered his vessel for public use, or held himself out as a common carrier, is not responsible as such.[10]

2. Some of the English statutes require notice of any claim against railway companies, for default in any undertaking under their charters, before suit brought. But under such statutes it has been held that no such previous notice is necessary where the act complained of is negligence in carrying goods or passengers, this not being a suit for any thing done under the act within the meaning of the statute requiring notice.[11] But it is held that where

[3] Levi *v.* Lynn & Boston Railw., 11 Allen, 300.

[4] Bank of Orange *v.* Brown, 3 Wend. 158.

[5] Gordon *v.* Hutchinson, 1 Watts & S. 285; Chevalier *v.* Strahan, 2 Tex. 115.

[6] McClure *v.* Richardson, 1 Rice, 215.

[7] Arnold *v.* Halenbake, 5 Wendell, 33.

[8] Rabrosk *v.* Herbert, 3 Alab. 392.

[9] Fuller *v.* Bradley, 25 Penn. St. 120; Kiston *v.* Hildebrand, 9 B. Mon. 72; Simmons *v.* Law, 8 Bosw. 213.

[10] Allen *v.* Sackrider, 37 N. Y. 341.

[11] Carpue *v.* The London & Brighton Railw. Co., 5 Q. B. 747; Palmer *v.* Grand Junction Railw. Co., 4 M. & W. 749.

Proof of the delivery of goods to a common carrier, and of a demand and refusal of the goods, or of their loss, throws upon the carrier the burden of showing some legal excuse. Alden *v.* Pearson, 3 Gray, 342.

the action was brought to recover the excess of charges for carrying goods above what was charged others for similar service, the company were entitled to notice of the claim before action.[12]

*3. By the English statute, the Railways Clauses Act, railways, stage-coach proprietors, and other common carriers of passengers, their baggage and other freight, are put upon precisely the same ground, both as to liability and as to any protection, privilege, or exemption. The same rule obtains in this country, except, perhaps, that inasmuch as this mode of transportation is infinitely more perilous to the lives of passengers, a proportionate degree of watchfulness is demanded of the carriers of passengers in this mode. But this is but extending a general principle of the law to this particular subject; to wit, that care and diligence are relative terms, and the degree of care and watchfulness is to be increased in proportion to the hazard of the business.[13]

4. It has long been settled that the responsibility of common carriers results not from any contract, or from any implied undertaking or understanding between the parties, but from the nature of the office or business; and that the declaration may be in form *ex delicto* as well as *ex contractu*, and that in the former case a verdict may pass against some of the defendants and in favor of others.[14]

[12] Kent *v.* The Great Western Railw. Co., 4 Railw. C. 699; s. c. 3 C. B. 714. This action is similar to Parker *v.* Great Western Railw. Co., 3 Railw. C. 563; s. c. 7 M. & G. 253; 7 Scott N. R. 835. In these cases, it was held, the taking of tolls is an act done in the execution of their charter powers.

[13] Commonwealth *v.* Power, 7 Met. 601; Jencks *v.* Coleman, 2 Sumner, 221; Camden and Amboy Railw. *v.* Burke, 13 Wend. 611; Pardee *v.* Drew, 25 Wend. 459. Carriers from places within the realm to places without, are subject to the same liability as carriers who carry only within the realm. Crouch *v.* London & North W. Railw., 25 Eng. L. & Eq. 287; s. c. 14 C. B. 255.

[14] Pozzi *v.* Shipton, 8 Ad. & Ellis, 963; 1 P. & D. 4; 1 W. W. & H. 624; Bretherton *v.* Wood, 3 Bro. & B. 54.

*SECTION III.

Liability for Parcels carried by Express and for Acts of Agents.

1. *Carriers, who allow servants to carry parcels, are liable for loss.*
2. *Importance of making railways liable for acts of agents.*
3. *Allowing perquisites to go to agents will not excuse company.*
4. *Owner of parcels, carried by express, may look to company.*
5. *May sue subsequent carrier, who is in fault.*
6. *European railway companies are express carriers.*
7. *Express companies responsible as common carriers.*
8. *Such companies who carry parcels or baggage from one city to another or from one depot to another, are common carriers.*
9. *Omnibus lines and railways common carriers* ex vi termini.
10. *Express companies held to deliver to consignee.*
11. *The extent and mode in which express companies may restrict their responsibility.*
12. *Agent authorized to procure goods is competent to bind the owner by conditions accepted by him.*
13. *Express company bound for safe carriage through its line, and for safe delivery to the next express agent, and in many cases for safe delivery at the point of destination.*
14. *They cannot be excused from this except on the ground of a clear and understanding stipulation to that effect on the part of the employer, and in a particular which is reasonable and not against good morals or good policy.*
15. *Express carriers must deliver at the earliest moment in regular business hours.*
16, *§ n. 25. Propositions declared in California case, and comments on the same.*
17. *Restrictive limitations in other cases.*
18. *Inconvenience no excuse for omitting personal delivery.*
19. *The consignee entitled to inspect goods.*
20. *Notice brought home to the other party will, in general, control the carrier's responsibility except for negligence.*

§ 169. 1. It may perhaps be assumed, that upon general principles common carriers who allow their servants, as the drivers of stage-coaches and the captains of steamboats, or the conductors of railway trains, to carry parcels are liable for their safe delivery, whether they themselves * derive any advantage from the transactions or not. Our own views upon this subject were expressed in a late case :[1] —

[1] Farmers' & Mechanics' Bank *v.* The Champlain Transportation Co., 23 Vt. 186, 203, 204. But it is said, in some of the elementary writers, and by some judges, that if such servant is allowed to do this, as a mere gratuity to him of the perquisites, and this is known to those who employ him, his principals are not liable for his default. 1 Parsons on Cont., 656; King *v.* Lenox, 19 Johns. 235. This was a case where the owner of the ship freighted her himself, and the master had no authority to take freight from others, and this known to those who employed him. Walter *v.* Brewer, 11 Mass. 99; Reynolds *v.* Toppan, 15 Mass.

* "It seems to us that when a natural person, or a corporation whose powers are altogether unrestricted, erect a steamboat, appoint a captain and other agents to take the entire control of their boat, and thus enter upon the carrying business from port to port,

370; Butler *v.* Basing, 2 C. & P. 613. But see the opinion of the court, in 23 Vt. 203, upon this point, where it is said: "It seems to us that this case is distinguishable from those, where it has been held incumbent upon the plaintiffs to show, by positive proof, that the company consented to the captain of their boat carrying money *on their account*, in order to hold the company responsible for the loss of the money. Sewall *v.* Allen, 6 Wend. 351, reversing the judgment in Allen *v.* Sewall, 2 Wend. 327, is one of that class of cases, so far as the determination of the Court of Errors is concerned. And that determination seems to meet with approbation in Angell on Carriers, § 101, and note 4. And *Story*, J., in Citizens' Bank *v.* Nantucket, S. B. Co., 2 Story, 16, and Chancellor Kent, 2 Kent, 609, seem also to approve the decision of the Court of Errors. But these cases, and the writers named, adopt this view of the subject, upon the ground that the charter of the company limits their business to the carrying of 'goods, wares, and merchandise,' and that bank-bills are neither, and so the company *prima facie* are not liable; and not liable in any event, unless they have given their consent to their proper business being enlarged, so as to include bank-bills, and also that this was a suit against the stockholders in their individual capacity, under the charter. Upon this narrow view of that case, the decision of the Court of Errors may stand; but, as applicable to a company, whose charter, on the face of it, does include the carrying of bank-bills, and in a suit directly against the corporation, it seems to us the reasoning is altogether unsound and unsatisfactory. And, unless that case is to be distinguished from the present, upon the ground of the restricted nature of the charter of that company, we should certainly incline to the opinion of the Supreme Court of New York, in Allen *v.* Sewall, rather than that of the Court of Errors. Mr. Justice *Story* (in 2 Story, *ut supra*) seems to admit, that, upon general principles, the captain's contract will bind the company to the extent of the charter powers."

But see Chateau *v.* Steamboat St. Anthony, 16 Mo. 216. Where the clerk of a steamboat carried money letters, as a mere gratuity, it was held that this did not render the proprietors of the boat liable as common carriers, but only as gratuitous bailees, for loss by gross neglect. Haynie *v.* Waring & Co., 29 Alab. 263. But the rule in the text is maintained in Mayall *v.* Boston & Maine Railw., 19 N. H. 122. See the opinion of *Gilchrist*, Ch. J., in the last case. In a suit against the owners of a steamboat to recover the value of a package of money intrusted to the clerk of the boat, to be transported to another port, it was held that the liability of the carrier in such case is to be determined by an inquiry into the nature and extent of the employment and business in which he holds himself out to the public to be engaged. And that proof of the usage of the clerks of such boats to receive and carry such packages from one port to another without hire, in the expectation that such boat would be preferred by these parties in their shipment of freight, is insufficient to bind the owners. Cincinnati & Lou. Mail Line Co. *v.* Boal, 15 Ind. 345.

they do constitute the captain their general agent, to carry all such commodities as he may choose to contract to carry within the scope of the powers of the owners of the boat. If this were not so it would form a wonderful exception to the general law of agency, and one in which the public would not very readily acquiesce.

2. "There is hardly any business in the country where it is so important to maintain the authority of agents as in this matter of carrying, by these invisible corporations, who have no local habitation, and no existence or power of action except through these same agents, by whom almost the entire carrying business of the country is now conducted. If, then, the captains of these boats are to be regarded as the general agents of the owners, — and we can hardly conceive how it can be regarded otherwise, — whatever commodities, within the limits of the powers of the owners, the captains as their general agents assume to carry for hire, the liability of the owners as carriers is thereby fixed, and they will be held responsible for all losses; unless, from the course of business of these boats, the plaintiffs did know, or upon reasonable inquiry might have learned, that the captains were intrusted with no such authority. *Prima facie*, the owners are liable for all contracts for carrying made by the captains, or other general agents for that purpose, within the powers of the owners themselves, and the *onus* rests upon them to show that the plaintiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants or else had given credit exclusively to the captain.[2]

3. "But it does not appear to us that the mere fact that the captain was, by the company, permitted to take the perquisites of carrying these parcels, will be sufficient to exonerate the company from liability. Their suffering him to continue to carry bank-bills ought, we think, to be regarded as fixing their responsibility, and allowing the captain to take the perquisites, as an arrangement among themselves. But we are aware that the question, with whom was the contract, and to whom the credit was given, will generally be one of fact to some extent."

4. And the general law upon this subject is well stated by the highest tribunal in the country, in an important case by Mr. Jus-

[2] Butler *v.* Basing, 2 C. & P. 613.

tice *Nelson*.[3] In this case it was considered that the owner of parcels carried by express might look to the responsibility of the company as common carriers, treating the express company as the agents of the owners of property carried, and that they were entitled to sue in their own names upon any contract, express or implied, existing, in relation to the things carried, between the express company and the principal carriers.

5. It is upon the same principle that the owner of goods is allowed to sue any of the subsequent carriers in the line of transportation, guilty of a default in duty, although his contract was made with the first carrier, to whom he delivered the goods.[4] This is indeed but a general principle of the law of contracts, familiar to every lawyer,[5] that contracts made by or with agents, may be

[3] New Jersey Steam Nav. Co. *v.* The Merchants' Bank, 6 Howard, 344. And it will not exonerate the railway company from its responsibility as a common carrier, that the owner of the goods furnishes his own car, in which the property is transported, and assumes the loading and unloading, and furnishes a brakeman to accompany the car. Mallory *v.* Tioga Railw. Co., 39 Barb. 488.

[4] Sanderson *v.* Lamberton, 6 Binney, 129.

[5] Lapham *v.* Green, 9 Vt. 407; Young *v.* Hunter, 4 Taunt. 582; Paterson *v.* Gandasequi, 15 East, 62; *Denman*, Ch. J., in Sims *v.* Bond, 5 B. & Ad. 389. But see Weed *v.* S. & S. Railw., 19 Wend. 534, where the principals, it is said, cannot sue, on a contract made by their agent to carry his trunk and money for expenses, if the trunk is not their property, but borrowed by the agent. In Stoddard *v.* Long Island Railw., 5 Sandf. 180, it was held that the owners of the goods were bound, by any special contract, between the agents for forwarding and the company upon whose trains the goods were forwarded. In Steamboat Co. *v.* Atkins & Co., 22 Penn. St. 522, it was considered that the forwarding merchant had such an interest in a contract made by him for forwarding goods, that he might maintain an action in his own name for a violation of it. But see King *v.* Richards, 6 Whart. 418; opinion of *Fletcher*, J., Robinson *v.* Baker, 5 Cush. 145. See, in confirmation of the rule laid down in the text, Langworthy *v.* New York & New H. Railw., 2 E. D. Smith, 195.

But in order to charge the carrier by a delivery to the servant, it must appear that it was the business, or, at least, the practice of the servant, to receive such parcels for carriage, otherwise the carrier is not liable. Blanchard *v.* Isaacs, 3 Barb. S. C. 388; Fisher *v.* Geddes, 15 La. Ann. 14. In Cronkite *v.* Wells, 32 N. Y. 247, it was held, that a delivery of a package to the clerk of the agent of an express company, outside the office, is not a delivery to the company, so as to make them responsible for the loss of the package, before it came into the hands of the agent. And the fact that the clerk was accustomed to receive such packages and receipt for them, or that the former agents of the company were accustomed to receive such packages of the plaintiff outside the office, will make no difference.

enforced by suits in the name of the principal, by whom or with whom the contracts were made. And there is another principle of law applicable to the subject, which will enable the owner of the goods to maintain an action against any carrier upon whose line loss or injury occurred; *i.e.*, that every carrier is liable *in tort* for his own default, or breach of duty, without reference to the special or express contract in the case.[6] And where a box containing goods, some of which was the property of one of the plaintiffs and some of another, was delivered to a railway company by a third party on behalf of the plaintiffs, the box being addressed to one of the plaintiffs, and was received by him at the place of destination, but the contents had been abstracted, it was held there was evidence of a joint bailment, in respect of which a joint action might be brought for the loss of the goods.[7] But it was considered that the mere breaking of the box and abstraction of the contents were not evidence of the commission of felony by the company's servants which could be submitted to the jury, although shown to have occurred while in the charge of the company.[7]

6. In England, and upon the continent, it is the uniform practice for the companies themselves to carry parcels, by express, which is here done by others chiefly, under contracts with the company.

7. But it cannot be questioned, we think, that the express companies who receive goods for transportation to remote points, without any special undertaking except what is implied from the manner of accepting the charge, are responsible as common carriers,[8] and so are also the companies employed by such expressmen to perform the transportation, without being entitled to claim any exemption from the full measure of their responsibility for care and diligence, on the ground of any special arrangement between themselves and those from whom they accepted the goods.[9]

[6] See 1 Chitty on Pleading, 134.

[7] Metcalfe *v.* London Br. & South Coast Railw., 4 C. B. (N. S.) 307, 311.

[8] Mercantile Mutual Insurance Co. *v.* Chase, 1 E. D. Smith, 115; Sherman *v.* Welles, 28 Barb. 403; Baldwin *v.* The American Express Co., 23 Ill. 197; s. c. 26 id. 504; Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189.

[9] Langworthy *v.* New York & H. Railw., 2 E. D. Smith, 195. In England, and upon the continent of Europe, the railway companies act as the carriers of parcels of all sizes and kinds, although, as before stated, they also carry packed parcels addressed to different consignees, and in the charge of some general or special agent acting on behalf of the consignees. In all such cases, whether such packed parcels are in charge of a general express agent, who makes that

8. Such companies as follow the business of carrying parcels between New York and Brooklyn, and such as carry the baggage

his constant employment, between certain points, and who would thereby himself incur also the responsibilities of a common carrier, or of a special agent of the consignees, acting upon a single occasion, and who would thereby himself incur only the responsibility of an ordinary agent, in both cases the owners have a right to resort to the responsibility of the company conveying the packages, and to hold them responsible to the full extent of common carriers generally, unless there is some stipulation between the company and the agents from whom they received the goods, that they shall incur a less degree of responsibility. Baxendale *v.* Western Railw. Co., 5 C. B. (N. S.) 336; Garton *v.* Bristol & Exeter Railw. Co., 7 Jur. (N. S.) 1234; s. c. 1 B. & S. 112; Branly *v.* Southeastern Railw. Co., 9 Jur. (N. S.) 329; s. c. 12 C. B. (N. S.) 63.

The same rule was established in this country, as it were, in the very infancy of transportation by express companies, in a case where the property was of considerable value ($18,000), and where the subject was considered and discussed in all its bearings by the Supreme Court of the United States. New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. 344. The leading opinion of the court was here delivered by Mr. Justice *Nelson*, and concurred in by Chief Justice *Taney* and Justices *McLean* and *Wayne*. Some of the other judges concurred in the result, but upon other grounds, and others dissented, but chiefly upon the ground of want of jurisdiction in the court, the suit being instituted in admiralty. This case must be considered as the leading American case in regard to the duties of railways and steamboats, in the transportation of express packages while in charge of the express agent.

The package in question, in this case, had been intrusted by the plaintiffs below to William F. Harnden, a resident of Boston, and the originator, probably, of this mode of transportation upon railways and steamboats, who was, at the time engaged in carrying "small packages of goods, specie, and bundles of all kinds, daily, for any persons choosing to employ him, to and from the cities of Boston and New York, using the public conveyances between those cities as the mode of transportation." He had entered into an agreement with the plaintiffs in error, the defendants below, by which, for $250 per month, he was allowed to transport upon their steamers his crate of parcels, "contents unknown;" the crate and its contents to be at all times at Harnden's risk, and the company "not, in any event, to be responsible, either to him or his employers, for the loss of any goods or other things transported under the contract." Public notice was required to be given by Harnden to this effect, and he was also required to insert this condition, exempting the steamboat company from responsibility, in the receipt which he gave for goods transported by him upon their boats. This condition was in the following terms: "Take notice. William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it, or its contents, at any time." The $18,000 was specie which the plaintiffs had employed Harnden to collect for them in the city of New York.

The points decided in this case are thus stated: The general owner of specie

of passengers from one depot to another in the city of New York, are common carriers, and liable as such.[10]

9. And it has been said that the courts are justified in assuming that the owners of omnibus lines are common carriers *ex vi termini*, and without any distinct evidence upon the point.[11] And railways are regarded as common carriers, although not so named in their charter.[12]

10. One of the distinctive characteristics of this mode of transportation is, that the companies, whether their line is by land or by water, or partly of each, undertake to deliver to the consignees, in the same manner all common carriers by land did, before railways came into general use,[13] it being now well established, that in the ordinary railway transportation, by common carriers of goods, there is no obligation after the goods reach their appointed destination, but to put them safely in warehouse.[14] It was mainly to remedy this defect in railway transportation of parcels of great value in small compass, that express companies were first instituted in America. That these companies are to be held ordinarily to personal delivery has been so often decided, as scarcely to require the citation of cases.[15]

11. Very important questions constantly arise in the courts, in regard to the extent of the limitation of the responsibility of these companies, by reason of conditions of that character, inserted in their receipts or bills of lading, given at the time of accepting

who has employed an expressman to transport it for him, may maintain an action against the carriers employed by such expressman, and who are the proprietors of a steamboat upon which the same is transported, for its loss, through the fault of such proprietors, or their agents. But, in such cases, the rights of the general owner are controlled by a valid contract between the expressman and the carriers employed by him. A stipulation, however, in such contract, that the carriers are not to be responsible in any event for loss or damage, cannot be construed to exonerate them for losses caused by their own want of ordinary care. We are not aware that these propositions have been seriously questioned or essentially qualified in the subsequent cases. The same rule is now firmly established in most of the American States. Buckland *v.* Adams Express Co., 97 Mass. 124. See also Southern Express Co. *v.* Newby, 36 Ga. 635.

[10] Richards *v.* Westcott, 2 Bosw. 589.

[11] Parmelee *v.* McNulty, 19 Ill. 556.

[12] Chicago & Aurora Railw. *v.* Thompson, 19 Ill. 578.

[13] *Post*, § 176, and cases cited.

[14] *Post*, § 176, pl. 19, and cases cited.

[15] Baldwin *v.* The American Express Co., 23 Ill. 197; s. c. 26 id. 504.

parcels for transportation. These limitations or conditions are binding to the same extent as in the case of other carriers.[16] It will be seen by reference to the discussion of the point,[16] that these limitations must be made in such a mode as: 1. Presumptively to have come to the knowledge of the owner of the goods, or his agent, authorized to act on his behalf; 2. They must be of such a natural and reasonable character, that the law can recognize them as not inconsistent with good policy and fair dealing, or in other words, as being reasonable.

12. A nice question may sometimes arise, in regard to the effect of a receipt from an express company, containing conditions qualifying the responsibility of the carrier, having become binding on the owner of the goods, by reason of being accepted by his authorized agent. As a general rule, the agent to whom the owner intrusts the goods for delivery, must be regarded as having authority to stipulate for the terms of transportation. By this we do not mean the porter or cabman, or mere servant, but the consignor of the goods, or any other agent of the owner, who purchases or procures them for him.[17] In a recent English case[18] where in the receipt for the goods delivered to the agent intrusted with the goods, under the head "conditions," was written: "No claim for deficiency, damage, or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days from the time they should have been delivered;" and the plaintiff testified: "He was told to sign the paper and did so; he might have seen the word conditions, but did not read them, and was not told what they were;" and one of the packages was not delivered, and was not called for within seven days of the time it should have been delivered; it was held there was nothing to rebut the presumption, arising from the signature of the paper by the plaintiff, that he understood the contract was subject to the conditions; and they were considered just and reasonable within the statute.

13. It is an important practical question, how far express companies are responsible for the delivery of goods at their point of

[16] *Post*, §§ 178, 179, 180.

[17] London & Northwestern Railw. Co. *v.* Bartlett, 7 H. & N. 400; s. c. 8 Jur. N. S. 58.

[18] Lewis *v.* Great Western Railw. Co., 5 H. & N. 867.

destination, when the line consists of several independent companies. We see no reason why there should be any legal distinction, in regard to this point, between express and other classes of common carriers. But in America, where the English rule of holding common carriers generally responsible for the ultimate delivery of parcels beyond their own line, does not obtain, the practical inference, resulting from the manner of transacting the business, will often be of importance, as indicating the natural inference and probable understanding of the parties, to be gathered from the transaction, whether it become a question of construction, resulting from the attending facts and circumstances, or remain a pure matter of fact to be judged of by the jury. Where there is a business connection between the different companies, although not amounting to an entire consolidation of interest, it is natural and proper the courts should hold the first company responsible to the same extent as in other cases of common carriers of goods or passengers' baggage.[19] And where the receipt given by the express company contains an unqualified stipulation to deliver to the consignee, describing his place of residence or business, the first company will be bound to deliver according to the stipulation. And where the cost of transportation throughout the entire route is paid to the first carrier, that will naturally raise an implication to perform the carriage paid for, unless some limitation of responsibility is specially stated in the receipt or bill of lading. But in general the undertaking of an expressman is to be construed like that of other carriers, to carry safely to the end of his route and deliver, in like good condition as received, to the next carrier upon the line,[20] with proper directions.

14. There can be no question, express companies may claim the same exemption and the same indemnity as other carriers, on the ground of bad package, the dangerous nature of the articles and the want of proper notice at the time of receiving them.[21] And the courts have recently manifested a disposition, in some States, to hold a firmer hand upon common carriers, in regard to the general tendency to reduce their common-law responsibility, by means of general notices, or somewhat covert conditions in

[19] *Post*, § 181, pl. 4, n. 11, 12, and cases cited.

[20] *Post*, § 181, and notes and cases cited; id. pl. 6, n. 15, pl. 7, n. 16; Northern Railw. Co. *v.* Fitchburg Railw. Co., 6 Allen, 254.

[21] *Post*, § 187, and cases cited.

their bills of lading, to the same standard as that of ordinary bailees. It seems always to have been held in Ohio, that common carriers could not, by general notices brought home to the owner of goods and not objected to by him at the time, so restrict their responsibility as to excuse themselves for just and reasonable liability for the ordinary hazards of the business.[22] And in Massachusetts it has been recently declared that a common carrier cannot by general notice exonerate himself from his legal responsibility, or fix a limit beyond which he shall not be held liable.[23] The result of all which seems to be, that the courts are ready to allow express companies, and all common carriers, to make reasonable regulations, in regard to the mode of conducting business with their employers, as to notices, insurance, and the rate of compensation; but they do not favor the repeal of the common-law responsibility of common carriers, unless when it is clear that the employer has understandingly and freely stipulated for such exemption. In a recent case[24] in Missouri it was declared to be the *prima facie* duty of all carriers to carry safely and deliver to the consignee, subject to the conditions that this did not require the carrier to go beyond his own line, or perform service inconsistent with the general course of his business.

15. As to the particular time and mode of delivery by express carriers, it has been held, that such carrier should deliver at the place of business of the consignee as early as practicable after arrival and within the usual business hours.[25]

16. In one case[26] the following propositions are declared: Restrictions upon the common-law responsibilities of common carriers, for their benefit, inserted in a receipt drawn and signed by them alone, for goods intrusted to them for transportation, are to be construed most strongly against them. If a common carrier, who undertakes to transport goods, for hire, from one place to another, and deliver to address, inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the

[22] Graham & Co. *v.* Davis & Co., 4 Ohio N. S. 362. *Scott*, J., in Welsh *v.* Pittsburg, Fort Wayne, and Chicago Railway Co., 10 Ohio (N. S.) 65, citing Jones *v.* Voorhes, 10 Ohio, 145.

[23] Judson *v.* Western Railway Company, 6 Allen, 486.

[24] Marshall *v.* Steamboat Philadelphia, 32 Mo. 256.

[25] Marshall *v.* The American Express Co., 7 Wis. 1.

[26] Hooper *v.* Wells, Fargo, & Co., 27 Cal. 11.

goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of the goods, occasioned by the carelessness or negligence of the employees on a steamboat, owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of transportation; such managers and employees are, in legal contemplation, for the purposes of the transportation of such goods, the agents and servants of the carrier. A receipt executed as above stated will not be construed as exempting the carrier from liability for loss occasioned by negligence in the agencies he employs, unless the intention to thus exonerate him is expressed in plain and unequivocal terms.[27]

[27] This case has been questioned, but the proposition that such a restrictive clause, to the extent that the express company are only to be responsible as "forwarders," could not be construed as exempting the carrier from responsibility for loss caused by the negligence of the employees on a steamboat, owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of transportation; and that in such case the employees of the steamboat are, in legal contemplation, the servants of the carrier, seems not susceptible of much question. The clause of exemption from responsibility, that the carriers shall not be "responsible except as forwarders," in its precise terms does not seem to have any just application to that portion of the transportation which was performed under the express supervision of their own agent. It would seem to have been inserted with reference to such cases as required transportation beyond the defendants' line. They were certainly not "forwarders" upon their own route and while the goods were in charge of their own servants, as was the fact when the loss occurred in this case. We think, therefore, that the court might, with perfect propriety, have held that the words had no application to transportation upon their own line, and consequently did not touch the present case.

But if they were susceptible of the application given them by the court, in favor of the carrier, as intended to reduce his responsibility as an insurer to that of an ordinary agent, general or special, which seems to us a far too liberal construction of the carrier's own words, by which he now claims to secure his own exemption from the extreme common-law responsibility, when other terms were far more natural and more effective for any such purpose; but, admitting this construction is allowable, still we think it cannot relieve the defendants, since it leaves them still responsible for ordinary care, diligence, and skill, in the conduct of the business of transportation. And this must extend, not only to themselves and their particular servants, but to all the agencies employed by them, both animate and inanimate. And although the owners might have looked directly to these servants of the carrier, and brought their action against the steamboat company, as in the case of New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; still, they were not obliged to do so. This company were employed

17. But there are other cases where a similar restrictive clause, that the carrier "shall only be held responsible as for-

by the carriers, as their servants, and they are responsible for their faithfulness and good conduct, as such, and there is nothing in the contract to throw this upon the owner of the goods, or to shift his claim for indemnity upon them. It is at the election of the owners whether they will pass over their immediate employees and call upon the general carrier for indemnity. The English courts, as we have elsewhere shown, *post*, § 178, and notes, will not allow the owner of the goods to maintain an action against any carrier connected with the transportation, except those with whom his immediate contract is made. But the American rule, as before stated, *ante*, pl. 5, gives the owner an election to call upon any one connected with the transportation for indemnity, to the extent of the loss or damage sustained through his particular default. And we think this the more just and reasonable rule.

So that upon every ground, it would seem, the owners of the goods might claim to recover, for a loss sustained through the want of ordinary care in those independent carriers employed by the express company with whom they contracted, since, if the restriction was not properly applicable to such independent carriers, they would be responsible to the full extent, as insurers, and the express company having assumed to overlook the transportation, personally, and to accept the whole price of transportation themselves, must be responsible to the owners for all defaults of independent carriers employed by them, and will in turn have a remedy over against such carriers. This may imply that the ultimate carriers will, in some cases, be liable to actions from more than one party for the same default. But this is true in all cases where business is transacted through the agency of others. The action may always be brought as before stated in the name of the agent, in whose name the contract is made, or of the principal. And in the latter case the defendant will have the same right of set-off, and other defences, as if the suit were brought in the name of the agent with whom he contracted. Lapham *v.* Green, 9 Vt. 407. And if, on the other hand, the ultimate carriers are regarded as coming within the fair construction of the restrictive clause in the receipt, then it will not avail the defendants, for the reason that it cannot properly be so construed as to cover defaults resulting from neglect of duty, in regard to proper care. New Jersey Steam Navigation Co. *v.* Merchants' Bank, *supra*.

The same remark applied to the former part of the case is true of the proposition, that a restrictive clause in the bill of lading or receipt given by the carrier, will not be construed to exempt him from responsibility for loss occasioned by negligence in the agencies employed by him, unless such intention is very clearly expressed in such instrument; it comes short of the true rule of law upon the subject. The better opinion, we think now is, that no person, natural or corporate, shall be allowed to stipulate for exemption from responsibility for his own negligence, because that removes one of the most direct and effective motives for faithful conduct, and such a contract would, therefore, be against sound policy; it is equivalent to allowing one to contract for license to do an immoral or an unlawful act. The license is void, and revocable at any time, and the promised reward, being the price of an act *contra bonos mores*, is not enforcible in a court of jus-

warders," has received a similar construction to the one already stated in the case from California, as having the effect of securing the carrier from all liability except for positive negligence and thus imposing upon the owner of the goods the burden of proving such default of the carrier.[28]

18. There seems to be no question made in the recent American cases, that express carriers *prima facie* assume the responsibility of common carriers and are bound, ordinarily, to make personal delivery on arrival at the place of destination.[29] And where the package, being money, was received to be delivered at the bank, at the place of destination, and the carrier arrived after the bank was closed, and carried the money twice to the house of the cashier, and not finding him, brought it back to the owner and offered it to him, but he refusing to accept it, the carrier declined to be further responsible for it, it was held he could not thus excuse himself from his undertaking, after having entered upon its performance, but must deliver the money at the bank in proper business hours and into the hand of the proper receiving officer.[30]

19. Where goods are sent by carrier to be paid for on delivery, the consignee is entitled to a reasonable time in which to inspect the goods before he accepts them, and the carrier does not make himself responsible for the price by affording reasonable opportunity for such inspection, even where he places them in the hands of the consignee, for that purpose, receiving from him the price, as a pledge for their return, if not accepted.[31]

20. It seems to be the general sense of the profession, and the almost uniform course of the more recent decisions, that express, and other common carriers may limit and restrict their responsibility as insurers, by general notices brought home to, and impliedly assented to by the owner of the goods, to any reasonable

tice. Post, § 179, pl. 5; McManus *v.* Lancashire Railw. Co., 2 H. & N. 693; s. c. 4 id. 327. In this latter hearing, before the Exchequer Chamber, the opinion of the Court of Exchequer was reversed, and all such contracts as professed to excuse the carrier for the neglect of duty by his servants, were held to be unreasonable and void under the English statute, 17 & 18 Vict. chap. 31, § 7.

[28] Kallman *v.* U. S. Express Co., 3 Kansas, 205.

[29] Haslam *v.* Adams Express Co., 6 Bosw. 235.

[30] Merwin *v.* Butler, 17 Conn. 138.

[31] Lyons *v* Hill, 46 N. H. 49.

extent; but that this will not extend any protection to the carrier against any default or misconduct either of himself or his servants.[32] And unless it appears that the damage accrued from the excepted risks and without the fault of the carrier, he will be held responsible.[33] The limitations of the bill of lading will bind the shipper, as to the extent of the responsibility of the carrier.[34] So also will a receipt given for the goods, at the time of delivery.[35] But evidence of a special oral contract at the time of the shipment, the bill of lading not being delivered till some time after, will control the carrier's responsibility.[36] But in Georgia it seems to be considered that the common-law responsibility of carriers can only be controlled by express contracts, of which provisions in their receipts are not sufficient evidence.[37]

SECTION IV.

Rights and Duties of Express Carriers.

1. *Liable for not making delivery to consignee.*
2. *Contract of company with local carriers only temporary.*
3. *Cannot charge in proportion to value of parcels, and restrict their liability.*
4. *Not responsible as common carriers in some cases.*
5. *Company, where statute prohibits discrimination, cannot charge express carriers higher than others, or give one such carrier exclusive privileges.*
6. *Responsible for not causing proper protest of bill.*
7. *Constructive grounds of limiting responsibility to his own route.*
8. *English statute requires packed parcels to be carried by weight.*
9. *Temporary residents entitled to the protection of the Massachusetts statute, as to married women.*
10. *The party failing to carry forward proper directions, responsible for consequent loss.*

§ 170. 1. This is a mode of transportation, as already stated, which has come in practice very much, since the general use of railways for transportation. It seems more necessary on account of the rapidity of movement upon such roads, and also the mode in which

[32] Baltimore & Ohio Railw. *v.* Rathbone, 1 West Va. 87.

[33] Czech *v.* General Steam Nav. Co., Law Rep. 3 C. P. 14; Newborn *v.* Just, 2 C. & P. 76; American Express Co. *v.* Sands, 55 Penn. St. 140.

[34] Farnham *v.* Camden & Amboy Railw. 55 Penn. St. 53.

[35] Bowman *v.* Am. Express Co., 21 Wis. 152. But see Prentice *v.* Decker, 49 Barb. 21; Limburger *v.* Westcott, id. 283.

[36] Detroit & Milw. Railw. *v.* Adams, 15 Mich. 458.

[37] Southern Express Co. *v.* Newby, 36 Ga. 635; Same *v.* Barnes, id. 532.

business is generally transacted by railway companies, of only delivering at their stations. Express companies, and agents, as far as we know, receive parcels at their offices, not only at their principal *termini* in the large towns and cities, but at local offices along the line of their routes, and even send their wagons about the cities and towns to gather up parcels when notified to do so, and adopt a similar course in delivering out parcels at the doors of the dwellings, or places of business, of the consignees. This mode of transacting the business of expresses seems to come in the place of the general carrying business of parcels;[1] or, accord-

[1] In a case in South Carolina, Stadhecker *v.* Combs, 9 Rich. 193, which was a suit against an express company for the value of a trunk lost by them, it is said: "A strict application of the law of common carriers is necessary for the protection of the large amount of property committed to the hands of strangers for transportation to distant points, and certainly, from such an application, express companies have no claim to exemption." And in Sweet *v.* Barney, 24 Barb. 533, it was held, that the party to whom money was sent by express might direct the place and mode of delivery. Hence, a bank in the city, to whom money is sent by bankers in the country by express, being considered the owner of the money, may authorize the same to be delivered at the office of the express company, or at any other place in the city, to any person it may select; and the express company, by making such a delivery, will be relieved of their responsibility, whether it be that of common carrier or forwarder. All the express company is bound to do in such cases is to make such a delivery as will charge the consignee. In the absence of all special provision, in such cases, it is the duty of the express agent to deliver the money at the bank, to the proper officer. And where it is the practice of such companies to deliver packages, according to their address, it will be presumed that they assume to deliver all packages committed to their custody in that mode. And in such case the only delivery which will charge the bank or release the express company, is a delivery according to the address of the parcel, at the bank, to the proper officer.

But where the express company delivered the money to a porter, at their office, who had usually been employed by the bank to receive such packages for them, it is not sufficient to discharge the express company, unless such delivery was authorized by the bank; and it is incumbent upon the express company to prove such authority in its own discharge. This proof may be direct and express, or implied from the acts of the porter, such as receiving money for the bank on other occasions at the express office, sent to it in a similar way and a similar address with the one in question, and with the knowledge and assent of the bank, provided the testimony is sufficient to satisfy the triers of the fact, that the bank authorized the porter to receive the money on their behalf, or that, from the manner in which they allowed him to conduct business on their behalf, they were bound to suppose others might understand that he was authorized to so act on their behalf, and that the express company did so understand it.

The Am. Railw. Times, Feb., 1858, speaks of a newspaper report of a recent

ing to the definition of the English Carriers' Act, of things of great value in small compass. And there can be no question that, upon general principles, these expresses are liable as common carriers, and liable, according to the course of their business, and the expectation thereby created in the mind of their employers, for all parcels received into their wagons, and bound to make personal delivery to the consignees or to their agents, at their places of business, or, in default of having such, at their residences. And since the establishment of such expresses, it will be presumed that one who expects a parcel to be delivered personally, or notice given to the consignee, will intrust it only to the express company upon the route, and his giving it in charge of the general freight agent of the railway is equivalent to an express contract, almost, that the company shall only be bound to such a delivery as is according to their general course in this department of their business. For, by delivering the parcel to the express company, the owner not only secures the responsibility of the express company or agent, but also of the railway company, unless they have stipulated with the express company for some exemption from their ordinary common-law liability as carriers, in the transaction of the business of the express company, and this is made known to, or might on inquiry be learned by, the owner of goods so sent. These propositions result from the elementary principles of the law of bailment, and are recognized by the best-considered cases.[2] And excuse must result from some agency beyond the control of the agents and employees of the carrier. And therefore, as before stated, a railway company is liable for loss resulting from the delay of transportation caused by the refusal of the company's engineers to work, although such conduct could not have been foreseen, and the places of such engineers

decision in Wisconsin, wherein it was held that a tender of money carried by express, at the bank, at any time, although not in banking hours, will discharge the company from their responsibility as common carriers, and from all liability, the money having been stolen from their safe during the following night, without their fault. There is probably some misapprehension in regard to the point upon which the case was decided; for a tender at a bank, out of known and recognized banking hours, is obviously no tender at all. One might as well make a tender to a merchant at midnight, after the store was closed. But it has been held that a tender after sundown, if made personally to the party, at his place of business, is good. Startup *v.* Macdonald, 6 M. & G. 593. So, too, a tender at a bank, while open and the officers in, might be good, although after banking hours. See Marshall *v.* American Ex. Co., 7 Wis. 1.

[2] N. J. Steam. Nav. Co. *v.* Merchants' Bank, 6 How. 344.

supplied in time to save the loss.[3] Under a written contract, by which the owners of a steamboat bound themselves as common carriers to deliver certain goods at a specified point, the loss of the goods by fire after having been deposited in a warehouse at the highest point to which, on account of the low stage of the water, the boat could ascend the river, does not excuse the defendant's failure to deliver the goods at the specified place.[4] And carriers of cotton, which was stored on the forecastle with the sacking torn and the cotton exposed, and there set on fire by carrying torch-lights upon the boat, according to the usual custom,[5] were held liable for its loss. Indeed, in all cases where it is shown that goods are put in charge of a common carrier, in apparently good condition, and are found subsequently in a damaged state, the carrier is *prima facie* responsible for the loss.[6] In an important case which recently occurred,[7] where a package of money was delivered to an express company to carry into another state, for the consignee to whom it was to be delivered, it was held, that where the company had been accustomed to enter all packages upon a delivery book, and to take a receipt upon delivery, the fact that no such entry has been made upon the delivery book tends to rebut any presumption of delivery; that express companies are responsible as common carriers, and are ordinarily to be regarded as undertaking to make delivery to the consignee, and that they are *prima facie* liable unless such delivery is made, except where the business is too limited to justify keeping a messenger to perform such act of delivery, and in such cases that prompt notice should be given to the consignee of the arrival of the package; that the undertaking of such express company ordinarily implies an actual delivery to the proper person at his place of business; and in no other way can the company discharge itself of responsibility except by proving performance of its undertaking, or that it has been prevented by the act of God or of the public enemy. And in the same case in a later volume,[8] it was held that the company will be responsible for the loss, when it appears that it occurred from not keeping the

[3] Blackstock *v.* N. Y. & Erie Railw., 20 N. Y. 48; *ante*, § 168, pl. 2.
[4] Cox *v.* Peterson, 30 Ala. 608.
[5] Hibler *v.* McCartney, 31 Ala. 502.
[6] Fenn *v.* Timpson, 4 E. D. Smith, 276; Hall *v.* Cheney, 36 N. H. 26.
[7] Baldwin *v.* The American Express Co., 23 Ill. 197.
[8] American Express Company *v.* Baldwin, 26 Ill. 504.

key of the company's safe securely, whereby access was obtained by one who stole the key and the money by thus gaining admission to the safe. And that where it appears that the company had delivered packages before entry upon the delivery book, it must nevertheless be shown that the company had in fact actually delivered the parcel in question, or at least offered to deliver it, at the proper time and place, in order to relieve itself from responsibility as common carriers.

2. It was held, in a recent case,[9] in the English Court of Exchequer, that a contract between a railway company and an individual, that he should, for a twelvemonth, carry all grain, merchandise, &c., between certain points to and from the railway, at a given price, he providing wagons, horses, drivers, tarpaulins, and other plant necessary for the cartage, and agreeing to be responsible for all money due to the company for the carriage of goods carted by him for such persons as had not ledger accounts with the company, and to observe all the regulations of the company, might be terminated at any time by the company, even after such person had provided himself with the requisite furniture to carry the contract into effect, and entered on its performance; the company having, in the mean time, made an arrangement with another railway, by which cartage between these points became unnecessary.

3. Where an express company restricted their liability in the receipt given for a package of bonds, with coupons attached, valued at $40,000, and charged for carrying a very high rate in proportion to the size or weight of the package, even beyond the usual rate of insurance, it appearing that no extraordinary care was bestowed on parcels of high value, it was held that there was no reason for enhancing the charge for transportation in proportion to the value of the articles carried, and that the charge was exorbitant and unreasonable.[10]

[9] Burton *v.* The Great N. Railway, 9 Exch., 507; s. c. 25 Eng. L. & Eq. 478. But the verdict in this case, at the trial before *Martin*, B., was for the plaintiff, on the ground that the company impliedly bound themselves not to do any thing, during the term the contract was to run, to deprive the plaintiff of the ordinary cartage between those points. And it seems to us the decision of Baron *Martin* is quite as satisfactory as that of the full bench.

[10] Holford *v.* Adams, 2 Duer, 471. But where the receipt given by the Express Company contained a condition that "the holder shall not demand above the sum of fifty dollars, the sum at which the article is hereby valued, unless

4. Express carriers who take parcels marked for distant points, and where they have no agents, have sometimes been held not responsible, as common carriers, to carry safely to the end of the route, and there deliver safely, but only for ordinary care as forwarders;[11] but this is not the present most approved rule on the subject. They may, however, restrict their liability by express contract.[11]

5. Where the statute requires a railway company to carry for all who apply, and upon equal terms, they have no right to impose increased prices upon express carriers who send freight by the company's trains, in aggregate quantities, made up of small parcels, directed to different persons.[12] Nor can railways impose their own terms for freight by including an extra and unreasonable charge for the receipt and delivery of freight and parcels, about the towns adjoining the stations.[12] So, too, a contract giving the exclusive privilege to one express company of transportation in the passenger trains is illegal and void, being in contravention of the statute requiring equal privileges and equal charges to all.[13]

6. Where an express company received, for collection for a reward, a bill of exchange drawn in one State and payable in another, and which therefore required demand of the acceptor and protest on the day of payment, in order to charge the drawer or indorsers, but which the express agent caused to be made one

otherwise herein expressed, or unless specially insured and so specified in the receipt," where no insurance was made and there was nothing to vary the clause in the receipt, it was held the carriers were liable only to the extent of fifty dollars. Newbergher *v.* Howard and Co.'s Express, Legal Int. June 16, 1866.

[11] Hersfield *v.* Adams, 19 Barb. 577. Where it is held that express agents who transport parcels by other lines of common carriers, are not themselves common carriers, but only forwarders, and liable as such. But see Read *v.* Spaulding, 5 Bosw. 395. See also Place *v.* Union Ex. Co., 2 Hilton, 19, where the case first cited is disapproved.

[12] Pickford *v.* Grand Junction Railw., 10 M. & W. 399.

[13] Sandford *v.* The C. W. & E. Railw. Co., 24 Penn. St. 378. And where an express company carried on its business within the State of Indiana, without complying with the statute of that State regulating such companies (March 5, 1855), it was held that their business thereby became illegal, and that the company could not maintain an action upon a bond given with surety by one of their servants or agents for faithful service and just account of all receipts. Daniels *v.* Barney, 22 Ind. 207. But it was here held, that where money had been paid by the party to an illegal transaction to an agent of the principal, the latter might recover the same, as the implied obligation of the agent to pay the money to his principal did not rest upon the illegal transaction.

day before the maturity of the bill, whereby the other parties were released, the acceptor being insolvent, it was held that the express company thereby became responsible to the holder of the bill for the amount.[14]

7. It seems to be a well-recognized rule in the American courts, applicable to express carriers, as well as other common carriers, that the receipt of a parcel of any kind destined to a remote point, and which, in the ordinary course of the transaction of the business, the first carrier will have to intrust to others with whom he holds no special business relations, that unless the first carrier make some special and express undertaking, he will only be responsible as a common carrier to the termination of his own route in the direction of the transportation; and this rule will exonerate a carrier who gives his receipt for a bill of goods, for collection, from a person beyond his route, in the absence of any special contract for the faithfulness of other carriers to whom, in the ordinary course of the business, the bill was intrusted, and who failed to pay over the amount collected.[15]

8. The English statute requires railways to carry parcels directed to one consignee according to the gross weight, although they have a label showing several destinations after delivery.[16]

[14] American Express Co. *v.* Haire, 21 Ind. 4.

[15] Lowell Wire F. Co. *v.* Sargent, 8 Allen, 189.

[16] Baxendale *v.* Southwestern Railw., 12 Jur. (N. S.) 274; 4 H. & C. 130; s. c. Law Rep. 1 Exch. 137. The case of Place *v.* The Union Express Co., 2 Hilton, 19, presents many interesting points of law, which we give in detail.

A common carrier is one who for a reward undertakes to carry goods for persons generally, as a public employment. "It is the receipt of, or the right to the freight or charge for the carriage of goods, together with the public nature of their employment, that makes them common carriers."

The Union Express Company received certain boxes of fruit, which they agreed by a receipt in writing to deliver at the depot at M. within twelve days, upon payment of freight, stipulating against responsibility for accidents and casualties beyond their control, and particularly that their guaranty of special despatch should not cover cases of unavoidable or extraordinary casualty. They also stipulated that fruit should be at the owner's risk of transportation, loading and unloading; that they would not be liable for injury to any articles of freight during the course of transportation, occasioned by the weather or accidental delays, or natural tendency to decay; that they would pay five cents per 100 lbs. for each day the fruit was delayed beyond contract time, and that all claims for damages, &c., should be presented for settlement at their office in New York. They shipped the fruit so received to M., the place of its destination, via N. Y. C. R. R. & G. W. R. R., with which roads alone they had any arrangement for transporta-

9. Under the Massachusetts statute for the protection of the property of married women, it was held, that where a man and

tion. For nearly two months prior to their taking the fruit in question the G. W. R. R. Co. had been unable to receive freight as fast as the N. Y. C. R. R. delivered it, and in consequence there was a great accumulation of it, and a delay of at least ten days on the average in the transportation. The fruit in question was in consequence delayed over twenty days upon the route, and was nearly ruined by decay when it reached M. There was another road by which the fruit might have been sent, but the Union Express Company had no arrangements for transportation with that road. In the action against the Union Express Company to recover the damages for the injury to the fruit, held, —

1. That the defendants' agreement to deliver the freight received according to the conditions of their tariff, classification, and rules, rendered them liable as common carriers for the safe carriage and delivery of the goods, and subjected them to the liability incident to that employment, except so far as it was limited by express stipulation.

2. That the proof by the consignee that he did not receive the goods within the time specified, coupled with evidence that a part of them did not arrive, was sufficient evidence of the failure of the defendants to deliver at the depot at M., to throw on them the onus of showing when the fruit did arrive at the depot. It was a matter peculiarly within their knowledge, and slight evidence on the part of the plaintiff was therefore sufficient to throw on them the burden of proof.

3. That the defendants were liable for the decay of the fruit. The clause providing that they should not be liable for natural decay must be understood as applying to decay which the fruit might be subject to during the prescribed time within which the defendants undertook to deliver it at M., not to such as was occasioned by the defendants' delay.

4. That the clause providing that the defendants should pay five cents per 100 lbs. for every day the goods were delayed beyond the time fixed by the contract for delivery did not limit the liability of the defendants thereto. They were liable in that amount whether the plaintiff suffered any loss by the delay or not, and were also liable for any actual damage to the fruit occasioned by such delay. That clause in the agreement applied only to cases where the property was delivered uninjured, but after the contract time.

5. That it was not necessary for the plaintiff, as a condition precedent to the defendants' liability, to present the claim for settlement to them at their office in New York. In order to avail themselves of any defence arising under the clause of the contract providing for such demand, it was necessary for them to plead a readiness to pay the amount of damages at such place, and follow it up by a tender of the amount in court.

6. That the facts shown as being the cause of delay did not prove that it was the result of an accident or casualty beyond the defendants' control. It was their duty to have known the conditions and possibilities of transportation upon the routes over which they were accustomed to transport their goods, before entering into a contract to deliver within a specified number of days; especially so when the cause of the detention was a disarrangement of the roads and a want of facilities upon one of the roads, not of a sudden development or of a temporary

woman came into the Commonwealth for the purpose of being married, and were married, and a few days after the woman, while residing at an inn, sent to a broker in the State from which she came and with whom she had deposited money or property earned by her before the marriage, and directed him to send her a sum of money by an expressman, which he did, with instructions to deliver it to her upon her own personal receipt; but the expressman delivered it to the husband, who absconded with it; that the woman might maintain an action in her own name against the expressman for the recovery of the money, if she had not given her husband authority to receive the money, or represented him as her agent.[17]

10. And where goods are sent with instructions to deliver on payment of the price, but are in fact delivered without such payment, and the purchaser becomes insolvent before payment, the party in fault in not forwarding the instructions or not observing them is responsible for the loss.[18]

SECTION V.

Responsibility for Baggage of Passengers.

1. *Liable as common carriers for baggage.*
2. *Liability where different companies form one line.*
3. *Company liable for actual delivery to the owner.*
4. *Company not liable unless baggage given in charge to their servants.*
5. *Liability results from duty, and not from contract.*
6. *Carrier responsible for baggage if servants accept it.*

§ 171. 1. It is an elementary principle in the law, that the carriers of passengers are liable as common carriers for their ordinary baggage, or, as it is more commonly called in the English books, luggage.[1] And it is considered that, as railways have made their

duration, but one that had existed for some time prior to their making the contract.

7. Where there is a special contract to carry within a *prescribed* time, the carrier is held to a rigid performance of it, and is not excused, even by inevitable necessity, unless he has provided against it by positive stipulation.

[17] Read *v.* Earle, 12 Gray, 423.

[18] Hutchings *v.* Ladd, 16 Mich. 493. But see Gordon *v.* Ward, 16 Mich. 360.

[1] Brooke *v.* Pickwick, 4 Bing. 218; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586; Bennett *v.* Dutton, 10 N. H. 481; Powell *v.* Myers, 26 Wend. 591; Dill *v.*

checks evidence in regard to the delivery of baggage, the possession of such check by a passenger is evidence against the company of the receipt of the baggage. In one case, the court say, "It stands in the place of a bill of lading."[2] And it has been considered that the admissions of the conductor, baggage-master, and station agent, as to the manner of the loss, made in reply to inquiries by the owner the next morning after the loss, are admissible as evidence against the company.[3] And proof that the baggage could not be found when inquired for by the passenger raises a presumption of negligence on the part of the carrier.[4]

2. And where different railways, forming a continuous line, run their cars over the whole line, and sell tickets for the whole route, and check baggage through, an action lies against either company for the loss of baggage.[5] And it is the duty of railway

Railw. Co., 7 Rich. 158, 162; C. & A. R. & T. Co. *v.* Burke, 13 Wend. 611; Robinson *v.* Dunmore, 2 Bos. & P. 416; Clarke *v.* Gray, 6 East, 564; s. c. 4 Esp. 177.

[2] Dill *v.* Railw. Co., 7 Rich. 158. And where the carrier gave public notice that he would not be liable for baggage of passengers, unless checked, this will not, if it have any effect, excuse him where the passenger delivered his baggage on board the carrier's steamboat to a proper agent, but was refused a check, because the person who gave the checks was not present. Freeman *v.* Newton, 3 E. D. Smith, 246. But in Wilton *v.* Atlantic R. M. S. N. Co., 10 C. B. (N. S.) 453, where the plaintiff took passage on board the defendants' ship on the terms of a ticket which stipulated the company should not be responsible for baggage, goods, or other property, unless a bill of lading were signed therefor, and that each first-class passenger should be allowed twenty cubic feet of baggage free, excepting certain articles, and the ship was lost, together with the plaintiff's baggage, through the negligence of the captain, the company were held not responsible. The plaintiff's luggage was received on board the ship, consisting of several trunks, without any questions being asked about it; the plaintiff neither declaring the contents nor taking a bill of lading, nor being required by any person to do so. The company were excused on the ground that no bill of lading was taken.

[3] Morse *v.* Connecticut River Railw., 6 Gray. 450. But the statements of an engineer, made some days after an injury by his engine, in regard to the occurrence, are not evidence against the company. Robinson *v.* Fitchburg & Wor. Railw., 7 Gray, 92. And declarations of the president of the company that he thought the company would pay plaintiff something, on plaintiff's application to the company for damages, and their vote to lay it on the table, are not evidence. Ib. But the fact that the consignee of goods made inquiry for them at the proper office, and could not obtain them after they should have arrived, is evidence of the loss. Ingledew *v.* Northern Railw., 7 Gray, 86.

[4] Van Horn *v.* Kermit, 4 E. D. Smith, 453. See also Garvey *v.* C. & A. Railw., 1 Hilton, 280.

[5] Hart *v.* Rensselaer and Sar. Railw., 4 Seld. 37. The person selling the

companies to keep agents in readiness to receive baggage, and if they allow the agents of other companies to receive their baggage at their stations, or their own agents to receive at the stations of other companies, they are bound by their acts.[6]

3. And where the company employ porters, at their stations, to convey passengers' baggage to the carriages in which the passengers leave the stations of the company, their liability continues till it is so delivered, and it makes no difference whether the baggage be placed in the same carriage with the passenger, or in the baggage car.[7] But if the passenger choose to take the exclusive control of his own baggage, as a purse, or coat, cane, or umbrella, for instance, the company are not ordinarily liable.[8] But the liability having once attached, by a delivery to the company's servant, they remain liable until a full and unequivocal redelivery

tickets and receiving the baggage is here treated as the agent of each company. This suit is against the last company on the route. And there was no evidence in the case where the loss occurred. Straiton *v.* N. Y. & N. H. Railw., 2 E. D. Smith, 184. The first company is liable for the entire route, if the baggage is lost. Cary *v.* Cleveland & Toledo Railw., 29 Barb. 35. And in a late English case it was held that the first company was the only one liable to be sued by the passenger, even where the loss occurred upon the line of one of the other companies. Mytton *v.* Midland Railw. Co., 4 H. & N. 615.

[6] Jordan *v.* The Fall River Railw., 5 Cush. 69.

[7] Richards *v.* The London, Brighton, & South Coast Railw., 7 C. B. 839. In a late case, Butcher *v.* London & S. W. Railw., 16 C. B. 13; s. c. 29 Eng. L. & Eq. 347, the plaintiff was a passenger from F. to W., bringing with him, as luggage, a small carpet bag, which was placed in the carriage he rode in. On arrival of the train at W., the plaintiff got out upon the platform with the bag in his hand, and it was taken from him by a railway porter to be placed in one of the cabs which were standing in the station. The plaintiff never saw his bag again, and the porter could not find it. It was proved to be the practice of the company to have their porters assist in carrying the passengers' luggage to the cabs in the station. Held, that there was evidence of the company having contracted to deliver the plaintiff's bag to the cab, and of their not having performed the contract, and that, whether the plaintiff had accepted a delivery upon the platform in lieu of a delivery to the cab, was a question of fact for the jury.

[8] Tower *v.* Utica & Sch. Railw., 7 Hill (N. Y.), 47. *Wilde*, J., in Richards *v.* London, Brighton, & South Coast Railw., 7 C. B. 839. But if the company have charge of the things in any manner, they are liable, notwithstanding the owner may also have an eye upon them. Robinson *v.* Dunmore, 2 Bos. & Pul. 416, *Chambers*, J.; Cohen *v.* Frost, 2 Duer, 335. Carriers of passengers, as steamboat proprietors, are not liable for the loss of wearing apparel which passengers carry about their persons, and do not deliver to the officers of the boat as baggage for safe-keeping. Steamboat Cr. Palace *v.* Vanderpool, 16 B. Monr. 302, 308.

to the owner, and ordinarily to the end of the route.[9] A delivery upon a forged order is no excuse.[10] A question sometimes arises in regard to the responsibility of passenger carriers for the baggage of passengers after its arrival at the point of destination, but before its delivery to the owner. We apprehend, that in analogy to other classes of common carriers, the responsibility must continue until the owner has had reasonable time and opportunity to come and take it away.[11] After that the responsibility as carrier ceases, and the carrier becomes a mere warehouseman, bound to exercise the same care that prudent men ordinarily do in keeping their own goods of similar kind and value. In one case,[12] where a railway passenger, on arriving at his place of destination, took his baggage into his own exclusive control, but afterwards, for his own convenience, handed it to the baggage-master at the station, to be kept until sent for, it was held the company were only liable for gross negligence, the bailment being without reward. That would unquestionably be the rule, where one leaves baggage at a station, who was not a passenger and did not purpose to become one. Indeed, the company could hardly become responsible at all in such a case, since their agents have no authority to receive baggage on their account, except as incidental to passenger transportation. But, so long as the custody of the baggage is incident either to a past or prospective transportation of the passenger, the company must be regarded, at the least, as bailees for hire, the fare paid extending both to the transportation of the passenger and his baggage, and the storage of the latter for a reasonable time afterwards, so as to meet any ordinary exigency of travel. But we should consider the case just referred to as standing upon the ground that the duty of transportation, with all its incidents, had become fully terminated, and, if so, it seems to us questionable how far the baggage-master had any authority on the part of the company to receive baggage merely to keep. It was clearly responsible only as a warehouseman. In a

[9] Camden & Amboy Railw. Co. *v.* Belknap, 21 Wend. 354.

[10] Powell *v.* Myers, 26 Wend. 591. If baggage be not called for in a reasonable time the liability of the company as carrier ceases, and they are holden only for ordinary care, as bailees for hire. *Post*, § 176; Van Horn *v.* Kermit, 4 E. D. Smith, 453.

[11] *Post*, § 176, pl. 8, 18.

[12] Minor *v.* Chicago & N. W. Railw., 19 Wis. 40.

somewhat recent case[13] in Vermont, this question is learnedly and judiciously discussed by *Aldis*, J., and the following propositions declared. A passenger arriving by cars at a railway station is justified in regarding the person who handles and takes charge of the baggage as the agent of the railway company; and notice to such person is notice to the company. It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can call for and receive it; and it is the owner's duty to call for and remove it within a reasonable time. If he does not so call for and receive it, it is the company's duty to put it into their baggage-room and keep it for him, being liable only as warehouseman. And the reasonable time within which the owner must call for it is directly upon its arrival, making reasonable allowance for delay caused by the crowded state of the depot at that time; and the lateness of the hour makes no difference, if the baggage be put upon the platform. Whether a bed, pillows, bolster, and bed-quilts, belonging to a poor man, who is moving with his family, carried along with him by a railway train, and packed in his trunk or box containing his clothing, are baggage or not, is a question to be decided by the jury, taking into consideration the peculiar circumstances, and the value, quality, and use of the articles. In Van Toll *v.* South Eastern Railw.,[14] it was considered that a passenger, who left her bag in the cloak-room of a station of the company, on her arrival, taking a ticket for the same and paying 2*d.*, there being printed on the ticket a notice that the company would not be responsible for articles so left, exceeding the value of £10, must be regarded as *prima facie* assenting to such restriction, and, therefore, that the company, in this instance, was not responsible beyond that amount for the loss of the contents of the bag by reason of delivering it to the wrong person. The obligation is the same in regard to baggage, where it is in excess of the weight allowed, and is paid for extra.[15] When a passenger did not call for his trunk on arriving at the termination of his route, but left it overnight, without any arrangement, and it was

[13] Ouimit *v.* Henshaw, 35 Vt. 605.

[14] 12 C. B. (N. S.) 75; s. c. 8 Jur. (N. S.) 1213. See also Curtis *v.* Avon, &c. Railw., 49 Barb. 148. [15] Glasco *v.* N. Y. Central Railw., 36 Barb. 557.

destroyed before morning by the burning of the station, it was held the company were not responsible.[16]

4. But where a passenger took passage upon one railway for B., at which point he intended to take passage upon another railway, whose terminus was about one hundred yards distant from the terminus of the first railway, there being an open, uncovered space between the two stations, and no connection in business between the companies, but a practice appears to have been conceded for the first company to carry luggage to the station of the other company, the porter obtained the plaintiff's portmanteau from the platform, where it had been deposited at the end of the first line, and placed it with other luggage on a truck, for the purpose of taking it across to the station of the other railway. The plaintiff testified, at the trial before the county court, that he saw the porter immediately after, with the truck, enter the station of the latter railway, and go to the place where luggage was put upon departing trains, but did not see his portmanteau, to recognize it, after it was first put upon the truck. He obtained his ticket, and asked the guard if his portmanteau was in the luggage van, and the guard told him to take his seat in the train, as it was about to move off, and to inquire for his portmanteau at the end of his route, which he did, but failed to find it. This suit was brought against the first company for not delivering the portmanteau either to the plaintiff or to the second railway, and the county court gave judgment against them upon the foregoing evidence. But it was held, on appeal to the Common Pleas, that the plaintiff must give preponderating evidence of the non-delivery; and the mere fact of its non-arrival at its ultimate destination on the second railway is not sufficient, nor was the above evidence more consistent with the non-delivery than the delivery, and the judgment of the county court was reversed.[17] But where an emi-

[16] Roth *v.* Buffalo and State Line Railw., 34 N. Y. 548.

[17] In this case the evidence all tended certainly to show a delivery to the second company, and therefore there was no testimony tending to prove the fact upon which the case is made to turn in the County Court. The decision in this case, therefore, seems consistent with those cases where the Court of Error has refused to reverse the judgment of the inferior courts, depending in any degree upon the determination of a disputed fact by the court rendering the judgment, where any testimony tends to support the judgment below. East Ang. Railw. *v.* Lythgoe, 10 C. B. 726; s. c. 2 Eng. L. & Eq. 331; Cawley *v.* Furnell, 12 C. B.

grant passenger, on a voyage from Liverpool to New York, took the exclusive possession of his trunk, taking it into the steerage, placing it under his bed, and fastening it to his berth by ropes, and during the voyage it was stolen, it was held that the owners of the ship were not liable.[18] In a very recent English case[19]

291; s. c. 6 Eng. L. & Eq. 397; Cuthbertson *v.* Parsons, 12 C. B. 304; s. c. 10 Eng. L. & Eq. 521.

In Semler *v.* Comm. of Emigration, 1 Hilton, 244, S., an emigrant arriving in New York, was, under the rules of the Commissioners of Emigration, placed on board a barge with the baggage, for the purpose of being landed. The barge belonged to and was in the custody of certain railway companies, who had ticket offices in Castle Garden, the premises of the Commissioners of Emigration. Upon landing, the baggage was transferred to the wharf by the employees of the railway companies, in whose charge it was left for the purpose of being weighed and marked, while S. was required to enter Castle Garden in order to have his name registered, pursuant to the rules of the Commissioners. During S.'s absence for this purpose his baggage was lost. Held, that the Commissioners of Emigration were not liable therefor. The baggage was not in their charge, nor in charge of any one of their employees. The remedy of S., if any, was against the persons in charge of the baggage, or of their employers, the railway companies.

[18] Cohen *v.* Frost, 2 Duer, 335. In Fisher *v.* Clisbee, 12 Ill. 344, it was held, that passengers on board of a ferry-boat, in taking care of their own property, after it has once got into the boat, may be regarded as agents of the ferryman, who is still liable for the property as a common carrier. The common carrier of passengers, by receiving the baggage of a traveller, becomes immediately responsible for its safe delivery at the place of destination. Woods *v.* Devins, 13 Ill. 746. But see White *v.* Winnisimet Co., 7 Cush. 155, where a person suffered damage, in crossing a ferry, by not taking proper care of his team, and the company were held not liable as common carriers, unless the owner of the team surrendered its custody to the ferryman, or his servants. In the case of Wilsons *v.* Hamilton, 4 Ohio (N. S.), 722, it was held, that a ferryman is a common carrier; but if the owner of animals intrusted to his care knows of any special cause of peril, he is bound to inform; and if the owner, or his agent, take upon himself the care of the property, he is not to be regarded as the agent of the carrier in so doing, and the carrier is not liable for any injury resulting from the want of care in the owner or his agent. Nor is the owner precluded from recovering because he did not do all that skill or prudence could have suggested. See Richards *v.* Fuqua, 28 Miss. 792.

The passenger not accompanying his baggage, but going in an after train, will not excuse the carriers from their ordinary liability. Logan *v.* Pontchartrain Railw., 11 Rob. (Louis.) 24.

But in Wright *v.* Caldwell, 3 Mich. 51, where the plaintiff, intending to take

[19] Le Conteur *v.* London & Southwestern Railw., 12 Jur. (N. S.) 266; L. R., 1 Q. B., 54; s. c. 6 B. & S. 961.

the question of the degree of exclusiveness of care which the passenger must take of his baggage in order to exonerate the carrier, is considered. In this case the article was a chronometer, which the plaintiff, on a passage from Jersey to London, carried in his hand, tied up in a handkerchief, the rest of his luggage being stowed away by the carrier, apart from the plaintiff, in the usual mode. On the arrival of the plaintiff at the pier in Southampton, he left his luggage to be carried by the defendants, in the usual mode, to the railway station; but he carried the chronometer in his hand, tied up in the handkerchief, to the railway station, walking through certain streets a distance of half a mile. On arriving at the station the plaintiff went, "with the chronometer in his hand, up to one of the railway carriages going to London, and gave the chronometer to a porter of the defendants,

passage on defendants' steamboat, deposited his trunk on board the boat, in the usual place for baggage, but without notifying any one employed on the boat, or making known his intention to take passage, and while temporarily absent the boat left, and the trunk could not afterwards be found, it was held no such delivery as to charge the defendant as a common carrier.

And an offer to deliver freight, or passengers' baggage, made at a proper time, though declined, discharges the carrier from his liability, as such; and if the freight or baggage still remains in his custody, he is only liable as a bailee for ordinary care. Young *v.* Smith, 3 Dana, 91. This was the case of a large amount of specie, carried, by consent of the officers of a steamboat, by a passenger, to be deposited in bank in the city of New Orleans. The court held it not requisite to deliver the specie in banking hours, unless some special contract or established usage of the port to the effect were shown, but that an offer to deliver any time in business hours, reasonable reference being had to its safety, was sufficient. In the case of Powell *v.* Mills, 37 Miss. 691, it was held, that ferrymen are subject to all the responsibilities of common carriers, and that after property was put on board their boats, it was *prima facie* in their charge, and they responsible for it. And it makes no difference that the owner is present, unless he consents to assume the exclusive charge of the property. The defendant was the keeper of a public ferry, and had agreed with the plaintiff for hire to transport his stage-coach and horses across the river, without making any contract to change his common-law liability as a common carrier. The plaintiff's coach and horses were driven into the ferry-boat by their driver, who thereupon vacated his seat, hitched the lines, and went to the front of the horses, and commenced giving them water dipped from the river in a bucket. Whilst thus engaged, one of the horses became restive, and before the boat reached the landing the team ran out of the boat into the river, the driver being carried with them in his efforts to stop them. Held, that the coach and horses were in the possession and custody of the ferryman, and not of the driver; and that the defendants were responsible for the damages thus sustained by the plaintiffs.

and who then in the presence of the plaintiff placed it on the seat of the carriage. Both the porter and the plaintiff immediately after this left the platform together, the porter to attend to other duties, and the plaintiff to look after the rest of his luggage, which had not arrived from the custom-house. The plaintiff remained absent some ten or fifteen minutes; when he returned the chronometer was not to be found." The comments of Lord Ch. J. *Cockburn* seem so precisely what the rule of law should be, in such cases, that we insert them at length: "When the case was first opened I imagined that the facts were such as to lead to the necessary inference that the plaintiff had taken possession of the chronometer in question, withdrawing it from the custody of the company, and himself taking charge of it. My first impression, however, appears to have arisen from a too rapid view of the circumstances. What really took place appears to be this, — that by desire of the plaintiff a porter of the company placed this article in one of the carriages, on a particular seat, which was to be reserved for the plaintiff. I am far from saying that no case can arise in which a passenger, having luggage which by the terms of the contract the company is bound to convey to the place of destination, can release the company from the care and custody of an article by taking it into his own immediate charge. But I think the circumstances should be very strong to show such an intention on the part of the passenger, and to relieve the company of their ordinary liability. And it is not because a part of the passenger's luggage which is to be conveyed with him is, by the mutual consent of the company and himself, placed with him in the carriage in which he travels, that the company are to be considered as released from their ordinary obligations. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have about him, in the carriage in which he travels, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be thereby relieved from the obligation of safe carriage, it would follow that no one who has occasion to leave the carriage temporarily could do so consistently with the safety of his property. I cannot think, therefore, we ought to come to any conclusion which would have the effect of relieving the company as carriers from their obligation to carry safely, which obligation, for general convenience of the public,

ought to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances, such in fact as would lead irresistibly to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company, before we say that the company, as carriers, are relieved from their liability in case of loss. If, therefore, this case had depended on the question whether or not the company were liable upon the general issue, I should be of the opinion that the plaintiff was entitled to recover."

5. A servant travelling with his master on a railway, may have an action in his own name against the company for the loss of his baggage, although the master took and paid for his ticket. The liability, in such case, is independent of contract, and the payment by the master will satisfy an averment of payment by the plaintiff.[20] But it has been held, that the father might have an action for the loss of his son's baggage while he was employed upon his own business, and had been furnished by his father with a travelling trunk and clothes for the journey.[21] And it is not important whether the passenger pay his own fare or it is paid by his friends.[22]

6. Common carriers of passengers sometimes assume to incur no responsibility for baggage unless delivered to their agents within a certain period before the departure of the passenger. But we apprehend that in such cases, if their servants at the proper place for receiving such luggage accept the same, to be carried with the passenger within any reasonable time, as the same day, or the night following, or the next morning,[23] they must be regarded as having accepted it, as common carriers, and their responsibility as such attaches. Thus in Connecticut[24] the plaintiff took his trunk to a railway station at eleven o'clock A. M., and requested that it be checked for the next train to B., which was to leave at three P. M., but being informed that they did not give checks for baggage until within fifteen minutes of the departure of the train, he left his trunk with the agent, and at the proper

[20] Marshall *v.* York, Newcastle, and Berwick Railw., 11 C. B. 655; s. c 7 Eng. L. & Eq. 519. In a declaration in case, against a common carrier, it is not necessary to allege the payment of, or agreement to pay, compensation. Hall *v.* Cheney, 36 N. H. 26.

[21] Grant *v.* Newton, 1 E. D. Smith, 95.

[22] Van Horn *v.* Kermit, 4 E. D. Smith, 453.

[23] Camden & Amboy Railw. Co. *v.* Belknap, 21 Wendell, 354.

[24] Hickox *v.* Naugatuck Railw. Co., 31 Conn., 281.

time obtained a check and went himself by the same train. When he received his trunk at the end of the route, some money and clothing had been taken from it, but whether before or after its being checked did not appear. The court held it immaterial, since the responsibility of the company, as carriers, attached upon the first receipt of the trunk. And the giving the check was only in the nature of a receipt, and did not control the time of the responsibility of the company attaching.[24]

SECTION VI.

What limitations and restrictions Carriers may enforce in regard to Baggage.

1 *and* 5. *Not liable for merchandise which passenger carries covertly.*
2. *And it makes no difference that the passenger has no other trunk.*
3. *Jewelry, being female attire, and a watch in a trunk, proper baggage.*
4, *and n.* 12. *So also are money for expenses, books for reading, clothing, spectacles, tools of trade, and many other similar things.*
6. *Carrier responsible for baggage, when passenger goes by another conveyance.*
7. *Cannot restrict all responsibility for baggage. May make reasonable regulations and follow them.*
8. *Definition of trinkets under the English statute.*
9. *In England companies may exclude baggage from cheap trains.*
10. *Stage proprietors, &c., responsible for luggage of their passengers.*
11. *But where employed by hotel keepers to transport their guests, both responsible.*

§ 172. 1. Railways, as carriers of passengers, are not liable for the loss of a package of merchandise which a passenger brings upon the train packed as baggage, unless the company, having an opportunity to know the contents of the package, see fit to accept it as baggage.[1] This question was considerably discussed in a recent case in New Hampshire,[2] where it was held that the carrier is not responsible for merchandise which a passenger takes along with him, unless a reward is given for the transportation, or it be of

[1] Great Northern Railw. *v.* Shepherd, 8 Exch. 30; s. c. 9 Eng. L. & Eq. 477. In this case the court gravely declare that a husband and wife, travelling together, may take 112 lbs. baggage, the limit for one person, by act of Parliament, being fifty-six pounds. Richard *v.* Wescott, 2 Bosw. 589; *post*, § 81.

[2] Smith & wife *v.* B. &. M. Railw. Co., 3 Am. Law Reg. (N. S.) 126; s. c. 44 N. H. 325. It seems to us that one of the conditions named in this case as the only ground of the liability of the carrier, is not indispensable; namely, that he should receive pay *for the transportation by the passenger ticket*. That is a thing which could never be proved, either in the affirmative or negative. If the

a character which by usage or custom is to be regarded as travelling baggage. And the fact that other passengers, on other occasions, had taken along with them in the passenger cars similar bundles of merchandise without objection, has no legal tendency to prove that the bundle in question was transported at the risk of the carrier, unless it were shown that such bundles were knowingly carried as part of the baggage and paid for by the passenger ticket. But the carrier, although not liable as an insurer, will be liable, as an ordinary bailee without hire, for any loss or damage which is proved to have been caused by his own gross negligence or that of his servants.

2. So the word "baggage" was held not to include a trunk containing valuable merchandise and nothing else, although it did not appear the passenger had any other trunk with him,[3] nor samples of merchandise, carried to enable the passenger to make bargains.[4] This question was considered and determined in the House of Lords,[5] where the law lords discussed the question at length.

carrier knowing its contents, accepts a bundle, or box, or trunk, containing merchandise, *as baggage*, we see no reason why he should not be responsible as a common carrier. If payment is made for a trunk of goods or merchandise, as extra baggage, the carrier is clearly responsible for its safe delivery.

[3] Pardee *v.* Drew, 25 Wend. 459. It was held that "thirty-eight pairs of new shoes, stock for sixty pairs boy's shoes, and two papers shoe-nails," are not included under the term "baggage." Collins *v.* Boston & Maine Railw., 10 Cush. 506.

[4] Hawkins *v.* Hoffman, 6 Hill, 586; Dibble *v.* Brown, 12 Ga. 217. But where a passenger delivered a box, containing embroideries, to the agent for receiving baggage, and demanded a check for the place of his destination, and was told that the company "did not check such goods," but that they would go safely, it was held the company were liable for the loss of the box, as common carriers, on the ground that there was no attempt to deceive them, or to have the parcel pass as baggage, unless they consented, and if they consented to accept and carry it, in a passenger train, they were liable, and might charge freight the same as if they carried it upon their freight trains. This seems to be a very reasonable view of the case. Butler *v.* Hudson River Railw. 3 E. D. Smith, 571. But there must be some proof that the person accepting the parcel was the proper agent for that purpose, or that it was placed in the company's cars. Ib.

[5] Belfast & B. & L. & C. Railw. Co. *v.* Keys, 8 Jur. (N. S.) 367, 9 H. Lds. Cas. 556, on appeal from the Exchequer Chamber in Ireland; 11 Ir. Com. L. R. 145; s. c. in C. B., 8 id. 167. In one report of the case, the reason assigned is, that the replication was bad, for not naming that the company had notice that the box contained merchandise, and this is the precise ground upon which the opinion of the judges is placed by Chief Baron *Pollock*. But the Lord Chan-

In this case the passenger took a through ticket, and had in his personal charge a case containing gold and silver watches, which an officer of the company on the journey requested the passenger to give him to be deposited in the luggage van, which was accordingly done. The property was subsequently stolen by one of the company's servants. By the rules of the company all merchandise not being personal luggage was to be paid for. An action was brought to recover the value of the case and watches. The defendant pleaded that the plaintiff was only entitled to carry personal baggage, whereas the case in question was merchandise. The plaintiff replied that the case manifestly contained merchandise, and was received by the defendants without objection, and without their demanding extra remuneration, and without inquiry as to the value of the case. The jury found that the case manifestly did contain merchandise, and that there was no improper concealment on the part of the plaintiff in respect of it, and that the defendants were guilty of gross negligence. On motion to enter up judgment for the defendant *non obstante veredicto*, on the ground that the replication was no valid answer to the special defence, the Exchequer Chamber, affirming the judgment of the Common Pleas, held the replication a good answer to the defence. The House of Lords reversed the judgment and held the defendants not liable. This was upon the ground that although by the orig-

cellor, in giving the leading opinion, puts the case mainly upon the ground, that the plaintiff intended to mislead the company, and covertly carry merchandise as baggage. And Lord *Wensleydale* puts the case upon the precise ground stated in the text. And in the case of Cahill *v.* London & N. W. Railw. Co., 10 C. B. (N. S.) 154; s. c. 7 Jur. (N. S.) 1164; 8 id. 1063, Exch. Chamber, 13 C. B. (N. S.) 818, it was held a railway company is not liable for the loss of merchandise delivered to them by a passenger as his personal luggage, without notice that the luggage contained merchandise. In this case the act of Parliament and the rules of the company allowed a certain weight of luggage with each passenger without additional charge; but the passenger was in fact ignorant of both. But the court considered he was bound to know the act of Parliament. The box in this case was marked, in large letters, — "glass"; but the company were held not responsible. But in the Exchequer Chamber the judgment was reversed, and the company held responsible, as if for so much luggage; for, having suffered the passenger to treat it as luggage, they could not, after the loss, set up that it was merchandise, and that therefore they were not responsible. The case of the Belfast Railw. Co. *v.* Keys, *ante*, was here cited, and this seems to be the view taken in the Exchequer Chamber of the law of that case, from which we cannot dissent.

inal contract the plaintiff was not to pay any thing for his luggage, he was bound to pay for his merchandise, and the acceptance of the case by the servant of the company did not alter the contract made by the company. This seems to us to be carrying the law to the very extreme on behalf of the company; further than necessity or fair dealing towards the passenger would seem to justify. The act of the servant in the course of his employment should bind the company. The decision of the Irish courts appears more satisfactory than that of the House of Lords, but the latter is now the law of England. But the later cases cited in note 5 seem to qualify this very essentially.

3. In one case the carrier was held responsible for articles of jewelry, carried among baggage, which were a part of female dress, the plaintiff travelling with his family, such articles being treated without question as forming a part of the passenger's baggage.[6] So a watch carried in one's trunk is proper baggage.[7] And so of linen cut into shirt-bosoms.[8] Finger-rings have also been regarded as wearing-apparel.[9] But a dozen silver teaspoons, or a Colt's pistol, or surgical instruments, except the passenger be connected with the profession, are not properly a portion of the travelling baggage.[10] And title-deeds and documents, which an attorney is carrying with him to use on a trial, are not luggage; nor is a considerable amount of bank-notes, carried to meet the contingencies or exigencies of the case.[11]

4. And railways, as carriers of passengers, are not liable for money, which passengers may carry as baggage, beyond a reasonable amount for travelling expenses.[12] The passenger is al-

[6] Brooke *v.* Pickwick, 4 Bing. 218; McGill *v.* Rowand, 3 Penn. St. 451. In Whitmore *v.* Steamboat Caroline, 20 Mo. 513, it was held not to be within the ordinary duty of a steamboat, as a common carrier, to transport specie, and that the officers could not bind the proprietors by such an undertaking, unless by proof of a usage, and that a passenger's baggage only included specie to the extent of his probable expenses. But see Nevins *v.* Bay Steamboat Co., 4 Bosw. 225.

[7] Jones *v.* Vorhees, 10 Ohio, 145.

[8] Duffy *v.* Thompson, 4 E. D. Smith, 178.

[9] McCormick *v.* Hudson River Railw., 4 E. D. Smith, 181.

[10] Giles *v.* Fauntleroy, 13 Md. 126.

[11] Phelps *v.* London & N. W. Railw. Co., 19 C. B. (N. S.) 321.

[12] Orange Co. Bank *v.* Brown, 9 Wend. 85; Weed *v.* Saratoga & Schen. Rail. 19 Wend. 534; Bell *v.* Drew, 4 E. D. Smith, 59; Duffy *v.* Thompson, 4 E. D. Smith, 178.

In the case of Jordan *v.* Fall River Railw., 5 Cush. 69, the rule, in regard to

lowed to take not only money sufficient to defray the ordinary expenses of the journey contemplated, but any reasonable sum in addition, for such contingencies as are not improbable.[13] But in one case it was held, without much reason, we think, that if the passenger carried necessary money for his journey in his trunk, the company were not liable for the loss.[14] And other cases have expressed doubts in regard to the general responsibility of common carriers for bank-bills.[15] And in another case,[16] where the passenger had in his trunk sixty dollars for the purpose of purchasing clothing at the place of his destination, it was held the carriers were not liable as such for any additional damages on account of the loss of this money.

money carried by a passenger as part of his baggage, is thus laid down by *Fletcher*, J.: "Money *bona fide* taken for travelling expenses and personal use, may properly be regarded as forming a part of the traveller's baggage." And this is, perhaps, as satisfactory and as definite a rule as the subject admits of. Taylor *v.* Monnot, 1 Abbott's Pr. 325; Merrill *v.* Grinnell, 30 N. Y. 594.

In Tennessee it seems to have been considered, that money beyond expenses, or a watch, are not a proper part of one's baggage in travelling. Bomar *v.* Maxwell, 9 Humphrey, 621. And in the case of Doyle *v.* Kiser, 6 Porter, 242, where a passenger on a canal boat had $4,000 in gold in his carpet-bag, which he did not name to the officers of the boat, and which was stolen during his passage, it was held the carriers were not liable beyond the value of the ordinary articles of baggage lost. *Perkins*, J., enumerates as such, "clothing, travelling expense money, books for reading and amusement, a watch, ladies' jewelry for dressing." A gold watch and gold spectacles were held such in the case of the steamer H. M. Wright, Newberry's Admiralt. 494. And in Davis *v.* Cayuga & Susquehannah Railw., 10 How. Pr. 330, it was held, that a harness-maker's tools, valued at $10, and a rifle, were to be regarded as properly forming a part of the passenger's baggage on a railway, and that the possession of the company's check was *prima facie* evidence of his having been a passenger on their trains, and that he had baggage checked on that occasion, the possession of the check being accompanied with proof of the custom of the company to put checks upon all baggage where it was required, and to give duplicates to the passengers. See also New Orleans Railw. &c. *v.* Moore, 40 Miss. 39. And a railway company cannot be made responsible for watches and valuable merchandise as passenger's baggage, even where the extra weight is specially paid for. C. & Ch. Air Line Railw. *v.* Marcus, 38 Ill. 219; Hutchings *v.* Western Railw., 25 Ga. 61.

[13] Johnson *v.* Stone, 11 Humphrey, 419.

[14] Grant *v.* Newton, 1 E. D. Smith, 95.

[15] Chicago & Aurora Railw. *v.* Thompson, 19 Ill. 578. In Ill. Cent. Railw. *v.* Copeland, it is held a reasonable amount of bank-bills may be carried in a trunk, and their value recovered as lost baggage. 24 Ill. 332.

[16] Hickox *v.* Naugatuck Railw. Co., 31 Conn. 281. We should have thought, on first impression, that this amount of money, for this purpose, might well

5. And where the plaintiff sent, by a passenger train, a quantity of merchandise, expecting to go himself in the same train, but did not, and the goods were lost without any gross negligence or any conversion by the carriers, it was held they were not liable.[17]

6. But where a passenger in a vessel had his baggage put on board another vessel because it did not arrive by cars in time for that on which he had taken passage, it was held that the owner of the vessel was not to be regarded as a gratuitous bailee, but as a common carrier, being entitled to demand pay for the transportation under the circumstances, either in advance or at the end of the voyage. It is here said, that in the common case, where the baggage accompanies the passenger, his fare includes fare for his baggage, but in any case, where a passenger orders his baggage sent by a carrier independent of any one to accompany it, if the carrier consents to accept the charge he may demand compensation, as before stated, and is liable as in ordinary cases.[18]

7. But companies cannot make such restrictions in regard to the kind of baggage and the mode of transportation as to virtually exonerate themselves from just responsibility.[19] But in any case, where the company are justified in refusing to carry a package, they may lawfully take it, if left on their premises, to the lost property office, and charge their regular fee upon redelivery.[19]

8. It is often made a question under the English Carriers' Act what is embraced under the word "trinkets." They must be

enough have been included in the category of necessary or convenient personal baggage; but the court thought otherwise, and reversed the judgment of Mr. Justice *McCurdy* in the court below, upon this ground alone.

[17] Collins *v.* Boston & Maine Railw., 10 Cush. 506. But it has been held, that where by the printed rules of a railway company the baggage-masters were prohibited from receiving merchandise on passenger trains, and he nevertheless took a carpet, the passenger not knowing of the rule, the company was held liable for the loss of the carpet. Minter *v.* Pacific Railw. Co., 41 Mo. 503. And where checks for baggage worth $400 were delivered to a carrier, and a receipt taken on which was printed "Liability limited to $100 except by special agreement," there being no proof of assent to these terms except by accepting the receipt, and the baggage was lost by the carrier's negligence, he was held responsible for the whole value, on the ground that the proof of assent to the limitation was not satisfactory, and if it were it did not excuse the carrier for negligence but only as insured. Prentice *v.* Decker, 49 Barb. 21; Limburger *v.* Wescott, id. 283. Carrier not responsible for silver-ware carried in the trunk of a passenger, as baggage. Bell *v.* Drew, 4 E. D. Smith, 59.

[18] The Elvira Harbeck, 2 Blatch. C. Ct. 336.

[19] Munster *v.* Southeastern Railw, Co., 4 C. B. (N. S.) 676.

either things of mere ornament, or, where that element predominates, such as bracelets, shirt-pins, rings, portmonnaies.[20] Common carriers of passengers may restrict their common-law responsibility as insurers of the delivery of baggage.[21]

9. In England, where the act of Parliament allows every passenger to carry a certain weight of luggage, it is held not to preclude the companies from excluding all luggage from cheap excursion trains, and where a passenger on such trains puts his baggage in the van, the company may demand reasonable compensation for its transportation.[22] But a railway company is liable for a passenger's luggage, although carried in the carriage in which he himself is travelling.[23]

10. Stage proprietors and omnibus drivers who assume to carry luggage for all who apply, from the railway stations about the towns, are unquestionably responsible as common carriers, and it does not affect the responsibility of such carriers, where they enter the names of passengers on way-bills, but do not enter the baggage.[24]

11. But where a hotel-keeper in the vicinity of a railway station gives public notice that he will furnish a free conveyance from the station to his house, for guests, and for this purpose employs the proprietors of certain carriages, it was held that a traveller to whom this arrangement was known, and who employed one of these carriages to carry himself and baggage to this hotel, the baggage being lost by the negligence of the owner of the carriage or his agents, might maintain assumpsit or case for the same against the proprietor of the house.[25]

[20] Bernstein *v.* Baxendale, 6 C. B. (N. S.) 251; 5 Jur. (N. S.) 1056. So silk watch-guards are "silk in a manufactured state;" and smelling-bottles come within the term "glass," used in the act. Ib.

[21] Peninsular & Oriental Steam Nav. Co. *v.* Shand, 3 Moore P. C. C. (N. S.) 272; s. c. 11 Jur. (N. S.) 771.

[22] Rumsey *v.* Northeastern Railw. Co., 14 C. B. (N. S.) 641; s. c. 10 Jur. (N. S.) 208. And a passenger who accepts a ticket for an excursion train, referring him to a bill on which it is announced that luggage in such trains is at the owner's risk, is not entitled to recover of the company for loss of such baggage, although in fact ignorant of the statement in the bill. And it will make no difference in the responsibility of the company, that they do not allow the passenger to retain his baggage under his own personal control. Stewart *v.* London & N. W. Railw. Co., 3 H. & C. 135.

[23] Le Conteur *v.* London & Southwestern Railw. Co., Law Rep. 1 Q. B. 54; 13 L. T. (N. S.) 325.

[24] Peixotti *v.* McLaughlin, 1 Strob. 468.

[25] Dickinson *v.* Winchester, 4 Cush. 115.

SECTION VII.

To what extent the Party may be a Witness.

1. *At common law the party could not be a witness in such cases.*
2. *Some of the American courts have received this testimony from necessity.*
3–5. *Decisions in different States.*
6. *Agents and servants of the company admitted to testify from necessity.*
7. *Where the party's oath is not received, the jury are allowed to go upon reasonable presumption.*

§ 173. 1. The question how far the party claiming to have sustained loss by carriers may be himself a witness in the action, since the general disposition manifested, both in England and this country, to admit the testimony of the parties generally, is becoming of much less importance. We will, nevertheless, refer briefly to the decisions upon this subject. We are not aware that any such exception was ever attempted to be made by the English courts. The general rules of evidence seemed altogether adequate to the exigency. If the carrier had lost the package or parcel, it was by his fault that the difficulty of ascertaining its contents had arisen, and the jury should, on that account, solve all doubts against him.[1]

2. But in many of the American courts it has been regarded as one of those exceptions, founded upon necessity, like the loss of a written instrument, where it became indispensable to admit the testimony of the party, the facts being, in presumption of law, confined exclusively to his knowledge. And some of the English books speak of the same rule being applicable to the proof of the contents of a box delivered to, and lost by, a common carrier.[2] But it does not seem to have been there followed, in recent times, unless the case possessed other features beyond the mere loss of the box, as fraud, or the intentional withholding of evidence. And some of the American cases, where the testimony of the party was admitted, as to the contents of parcels delivered to carriers, and lost by them, have been of the latter character.[3] The Ameri-

[1] Greenleaf's Ev. § 37; Armory *v.* Delamirie, 1 Strange, 505. But the decisions are not uniform upon this subject, especially where there is no intentional withholding of evidence. In such case it has been held the presumption is to be against the plaintiff. Clunnes *v.* Pezzey, 1 Camp. 8; Dill *v.* Railroad Co., 7 Rich. 158, 163; 6 id. 198.

[2] 12 Viner, Ab. 24, pl. 34.

[3] Hermann *v.* Drinkwater, 1 Greenleaf, 27. This is the earliest case we

can courts have evidently admitted the exception with reluctance, and have manifested a constant disposition to restrain it within the narrowest limits.

3. Hence in Pennsylvania they hold that it only extends to such articles of wearing-apparel as it may ordinarily be presumed the party himself, or his wife, will have packed, and consequently be the only witnesses able to give testimony[4] in regard to them.

4. And in Massachusetts the courts have altogether repudiated the rule of the admissibility of the party as a witness, in this class of cases, on the ground of necessity.[5]

5. But in Ohio the courts seem to have adopted the same view of the subject as in Maine and Pennsylvania.[6]

6. In some cases it has been held that the servants of the company, who have charge of things carried on their trains, are *ex necessitate*, competent witnesses, to prove the delivery thereof to the owner, in an action for non-delivery, although they thereby

recollect to have seen of this kind in the American Reports, and was one of fraud, where a shipmaster, having received a trunk of goods on board his vessel for carriage, broke it open and abstracted the goods. This case is virtually reaffirmed in Gilmore *v.* Bowdoin, 3 Fair. 412, and the exception rests here altogether upon the ground of necessity. See Garvey *v.* C. & H. Railw., 1 Hilton, 280. And the same rule obtains in Illinois. Parmlee *v.* McNulty, 19 Ill. 556; s. c. 20 Ill. 392; Davis *v.* Railw. 22 id. 278.

[4] Clark *v.* Spence, 10 Watts, 335. See also David *v.* Moore, 2 W. & Serg. 230; Whitesell *v.* Crane, 8 W. & Serg. 369; McGill *v.* Rowand, 3 Penn. St. 451. See also The County *v.* Leidy, 10 Penn. St. 45; Pudor *v.* B. & M. Railw., 26 Maine, 458; Dibble *v.* Brown, 12 Ga. 217.

[5] Snow *v.* The Eastern Railw. Co., 12 Met. 44. But by statute of 1851, c. 147, § 5, it is provided the party may, in such cases, swear to the correctness of a descriptive list of the articles contained in passenger's baggage. And by Gen. St. ch. 131, § 14, parties are witnesses generally. So that this question becomes of comparatively small importance here; and the same is now true in England and in most of the American States. The court here recognize the right of the party to testify to the contents of a parcel of which he is robbed. Proceedings against the Hundred, B. N. P. 187; East Ind. Co. *v.* Evans, 1 Vern. 305. The same rule upon this subject is adopted in New Jersey as in Massachusetts. Graby *v.* Camden & Amboy Railw., 19 Law R. 684. So also in Michigan. Wright *v.* Caldwell, 3 Mich. 51. So also in Illinois. Ill. Central Railw. *v.* Copeland, 24 Ill. 332.

[6] The Mad River & L. Erie Railw. Co. *v.* Fulton, 20 Ohio, 318. In this case, it was held that the owner of baggage and his wife are competent witnesses to prove the contents of a trunk lost by the plaintiffs, and its value, consisting of the ordinary baggage of a traveller, on the ground of necessity. See also Johnson v. Stone, 11 Humph. 419; Oppenheimer *v.* Edney, 9 id. 385.

exonerate themselves from blame and liability in a future action.[7]

7. The authorities upon this general subject are not uniform. And where the courts refuse to admit the party to testify to the contents of trunks, &c., lost by common carriers, it becomes matter of necessity to allow the jury to give damages proportioned to the value of the articles, which it may fairly be presumed the trunk, &c., might and did contain.[8] By the construction of the statute in Kentucky,[9] the members of railway corporations are made witnesses in suits where the company is a party.

SECTION VIII.

When the Carrier's Responsibility begins.

1. *Begins, in general terms, upon delivery of the goods.*
2. *Delivery at the usual place of receiving goods, with notice, sufficient.*
3. *Where goods are delivered to be carried, carrier liable from delivery.*
4. *But not responsible on a continuous line till they receive the goods.*
5. *Acceptance by agent sufficient, without payment of freight.*
6. *Question of fact, whether carrier took charge of the goods.*
7. *Sufficient to charge company, that goods are put in charge of their servants.*
8. *Whether goods are left for immediate transportation, matter of inference often.*

§ 174. 1. There is no difficulty in defining in general terms when the liability of the carrier begins. It begins when the goods are delivered to him, or his proper servant, authorized to receive them, for carriage.

2. But many questions have arisen as to what amounted to a delivery, so as to put the goods into the constructive custody and risk of the carrier. If the goods are delivered for carriage at the usual place of receiving similar articles, and notice given to the proper servant of the company, there is little chance for any ques-

[7] Draper *v.* Worcester & N. Railw., 11 Met. 505; Moses *v.* B. & M. Railw., 4 Fos. 71, 80.

[8] Dill *v.* Railroad, 7 Rich. 158; Stadhecker *v.* Combs, 9 Rich. 193.

[9] Civil Code, § 675; Covington & Lexington Railw. Co. *v.* Ingles, 15 B. Monr. 637. See also, as bearing upon the general question discussed in this section, Sugg *v.* Memphis and St. Louis Packet Co. 40 Mo. 442; Moran *v.* Portland Steam Packet Co., 35 Me. 55.

tion upon this subject, in regard to the responsibility of the company to the end of their route. For a carrier is bound to keep the goods safely after delivery to him for carriage, as well as to carry safely.[1] Questions have often arisen upon this subject, where the person to whom the delivery was made acted as a forwarding merchant or warehouse-keeper, or in some capacity independent of that of carrier, whether the delivery and acceptance of the goods were in the capacity of carrier or agent for the carrier, or in the other capacity which the person sustained.

3. But in the case of railways such questions seldom arise at the beginning of the transit, unless where the goods are delivered to be kept in warehouse until further orders, in which case the liability of carrier will not attach until the goods are ordered to be carried. But when this order is given, and also when the goods are left in the first instance to be carried presently, the responsibility of the carrier attaches at once.[2]

4. In a case where a railway formed part of a continuous line of transportation, and had an agent at Charleston (S. C.) to look after goods arriving at that point for the interior along the line of their railway, and a package of goods, so addressed as to have gone over such railway, was lost after its arrival at C., it was held,

[1] *Lee*, Ch. J., in Dale *v.* Hall, 1 Wilson, 281; Merriam *v.* Hartford and New Haven Railw., 20 Conn. 354. In this last case it was decided, that a delivery upon a wharf where steamboat carriers were accustomed to receive their freight, and which they held as private property, fenced off from the street for that purpose, and where they usually had some one to take charge of freight, was a constructive delivery to the carriers, although no notice to the freight-master was proved, it being shown to be the custom of the company to regard all freight delivered on that dock as received for transportation.

The goods, in this case, were given in charge of one of the steamboat hands who seemed to have charge of the dock, and who said, on being informed of the delivery, "All right." And the company will be held responsible for all damages accruing after delivery to them, although not allowed to complete the transportation by reason of the interference of the insurers on the ground that the goods are not in fit condition for transportation, and the insurers may recover such damages, if it operate to their loss. Rogers *v.* West, 9 Ind. 400. See also Lakeman *v.* Grinnell, 5 Bosw. 625.

[2] Spade *v.* Hudson River Railw., 16 Barb. 383. In this case the plaintiff took part of the goods away, after they were put into the custody of defendants' servants, without their knowledge, and it was held, the company were simply depositaries, and were not liable as carriers; and the plaintiff could not call upon a jury to conjecture how many of the goods were lost, but must show first how many he took away, and how many he left.

"that until the goods are in possession of the railway, they are not liable as common carriers." [3]

5. It has been held sufficient to charge the carrier, that the delivery was at a place and to a person where and with whom parcels were accustomed to be left for this carrier; and it is immaterial whether any payment of freight is made to this person.[4]

6. But an acceptance by the carrier at an unusual place, will be sufficient to charge him. It seems always sufficient that the goods are "put into the charge of the carrier." [5] And what is a sufficient putting in charge of the carrier, must always be a question of fact, to be judged of by the jury, with reference to all the circumstances of the case, and the usual course of business in similar transactions, at the same place and with the same company. And it will be found ordinarily to resolve itself into this inquiry, whether the owner of the goods did all to effect a secure delivery to the carrier which it was reasonable to expect a prudent man to have done under the circumstances.

7. But the cases all agree that it is always sufficient if the proper servants of the company accept the goods to carry, whether the acceptance is in writing or not, or whether any bill or any entry in the books of the company is made.[6] And the point of such acceptance and charge by the carrier is ordinarily when the goods are put into the charge of those who are in law the servants of the carrier.[7] It has been considered that if the owner assume the care and custody of the thing himself, instead of trusting it to the car-

[3] Maybin *v.* The S. C. Railw., 8 Rich. 240. In the case of Bonney *v.* The Huntress, 4 Law J. 38, s. c. *nom.* The Huntress, Dav. C. C. Rep. 83, in Admiralty, for a box of goods shipped at Boston, to be delivered at Portland, it was held, "It is the duty of the owners of goods to have them properly marked, and to present them to the carrier or his servants, to have them entered on their books, and if they neglect to do it, and there is a misdelivery and loss in consequence, without any fault of the carrier, the owners must bear the loss." See Krender *v.* Woolcott, 1 Hilton, 223.

[4] Burrell *v.* North, 2 C. & Kirwan, 680. *Erle*, J., said, "If the defendant allow these persons to receive parcels, to be conveyed by him, as a carrier, this is quite enough."

[5] Lord *Ellenborough*, Ch. J., in Boehm *v.* Combe, 2 M. & S. 172.

[6] Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story, 16; Phillips *v.* Earle, 8 Pick. 182; Pickford *v.* Grand Junction Railw., 12 M. & W. 766.

[7] Boys *v.* Pink, 8 C. & P. 361; Davey *v.* Mason, 1 Car. & M. 45. But the crew of a steamboat are not the agents of the boat, for the purpose of receiving freight, whereby to charge the owner as a common carrier. Trowbridge *v.* Chapin, 23 Conn. 595. See also Ford *v.* Mitchell, 21 Ind. 54.

rier, the carrier is not liable for the loss.[8] But the fact that the owner accompanies the goods to keep an eye upon them, if he do not exclude the care of the carrier's servants, will not excuse the carrier.[9] But it has been held, that the delivery of the goods must be made known to the servants of the company or carriers. This would seem indispensable ordinarily to constitute carefulness and good faith on the part of the owner.[10]

[8] Tower *v.* The Utica & S. Railw., 7 Hill (N.Y.), 47. This is the case of a passenger who left his overcoat upon the seat in the car, and forgot to take it. Miles *v.* Cattle, 6 Bing. 743, is to the same effect. *Post*, § 183. But a passenger carrier is not liable for what is not ordinary baggage. Orange Co. Bank *v.* Brown, 9 Wendell, 85; East Ind. Co. *v.* Pullen, 2 Strange, 690; *Ante*, §§ 171, 172.

[9] Robinson *v.* Dunmore, 2 Bos. & P. 416.

[10] Selway *v.* Holloway, 1 Ld. Ray. 46; Packard *v.* Getman, 6 Cow. 757. In one case, Illinois Central Railw. *v.* Smyser, 38 Ill. 354, where warehousemen having cotton to send by rail applied to the company, who ran a car upon a side-track to the warehouse. The cotton was loaded upon the car, and the agents of the company notified. It was the custom of the company, upon receiving such notice, to have the bales counted and give a bill of lading, in which it was their custom, known to the other party, to except losses by fire, and then send an engine to remove the cars. Before these last steps had been taken, the cotton was destroyed by fire. It was held, the delivery was complete, and as the bill of lading had not been made and accepted, they could not claim any exemption from common-law responsibility, and were liable for the loss. But it is fair to say, that the decision would meet the highest sense of justice, more fully, if the delivery had been held only to incur the responsibility which the company were expected by the warehousemen to assume.

But a delivery to the mate of a vessel by which goods are to be carried, is sufficient to charge the owner as carrier, when that is the custom of the wharf, and the wharfinger's responsibility terminates thereupon. Cobban *v.* Doune, 5 Esp. 41.

And where a heavy article was carried by a truckman, upon the grounds and to the depot of a railway company, for transportation, and had been accepted and taken charge of for that purpose, and was afterwards injured while being loaded upon the company's cars, in part through the carelessness of the truckman, it was held, the company were responsible, their responsibility having attached by their servants taking charge of the goods, and being engaged in loading the same upon a car at the time the damage occurred. Merritt *v.* Old Colony & Newport Railway, 11 Allen. 80.

And where goods had been accepted by the master of a ship in pursuance of the contract of affreightment, and were destroyed by the bursting of a boiler of the ship, while alongside in the lighter, it was held, the owner might recover for the loss, and that he had a lien upon the ship. The Bark Edwin, 1 Sprague, 477. See also Schooner Freeman, 18 How. U.S. 182.

After the carrier has receipted for the goods, they are as much at his risk as if they were aboard the vessel. Greenwood *v.* Cooper, 10 La. Ann. 776.

8. Where a railway have a warehouse, at which they receive goods for transportation, as common carriers, and goods are delivered there with instructions to forward presently, the company are liable, as common carriers, for the delivery of the goods. But if they are kept back by direction of the owner, the company are only responsible as depositaries.[11] Instructions to forward forthwith may be inferred from the course of business in the absence of express proof.[11] And where the owner gave instructions to forward immediately, he will not be bound by counter instructions given by the cartman without his authority.[11]

[11] Moses *v.* Boston & Maine Railw., 4 Foster, 71. And if the defendants are both warehousemen and carriers, and receive goods, with instructions to forward immediately, they are liable as carriers. Clarke *v.* Needles, 25 Penn. St. 338; Blossom *v.* Griffin, 3 Kernan, 569.

But where goods are received as wharfingers, or warehousemen, or forwarding merchants, and not as carriers, the bailors are only liable for ordinary neglect. Platt *v.* Hibbard, 7 Cowen, 497. See Mich. Southern & Northern Ind. Railw. Co. *v.* Shurtz, 7 Mich. 515.

And where the owner, after making delivery to the carrier, requests that the goods be not forwarded until he hear from the consignee, and in the mean time the goods being combustible are consumed by fire, communicated from an engine of the company; it was held, that the direction relieved them from the responsibility of carriers, and they were only liable for negligence as warehousemen. St. Louis, &c. Railw. *v.* Montgomery, 39 Ill. 335.

SECTION IX.

Termination of Carrier's Responsibility.

1. *Responsibility of carrier of parcels for delivery.*
2. *Company not bound to make delivery of ordinary freight.*
3. *The duty, as to delivery, affected by facts, and course of business.*
4. *Railway company ordinarily not bound to deliver goods, or give notice of arrival.*
5. *Rule, in regard to delivery, in carriage by water.*
6. *Only bound to keep goods reasonable time after arrival.*
7. *Consignee must have reasonable opportunity to remove goods.*
8. *After this, carrier only liable for ordinary neglect.*
9. *If goods arrive out of time, consignee must have time to remove, after knowledge of arrival.*
10. *So if company's agent misinform the consignee.*
11. *Carrier excused when consignee assumes control of goods.*
12. *Effect of warehousing, at intermediate points, in route.*
13. *If next carrier has place of receiving goods, responsibility ceases on delivery there.*
14. *Warehousemen, who are also carriers, held responsible as carriers, on receipt of goods, generally.*
15. *Goods addressed by carrier to his own agent does not terminate transit.*
16. *Consignee refusing goods, duty of carriers.*
17. *Leading facts in an English case on same point, and ruling of Exchequer Chamber.*
18. *Duty of the carrier in such cases, by American decisions.*
19. *May put goods in his own or other warehouse.*
20. *Where the carrier by water cannot find the consignee, he may exonerate himself by delivery to a responsible warehouseman.*
21. *An English case exonerating the carrier on arrival of the goods, it being Sunday, no delivery could be made until Monday. Quære?*
22. *The carrier's responsibility ends when the warehouseman's crane is attached to hoist the goods.*
23. *Unlawful seizure or invalid claim of lien no excuse to the carrier for non-delivery.*
24. *In carriage by water the delivery to the consignee must be according to the custom of trade and the usages of the port and in regular business hours.*
25. *Tender to the party entitled to receive the goods will exonerate the carrier, as such, and he will then only be responsible as an ordinary bailee.*
26. *Arrangement with consignee binding.*
27. *In carriage by water, in general, there must be notice to consignee and delivery at the wharf, &c.*
28. *Carrier cannot charge for carrying to and from depot, unless, &c.*
29. *By English statute can make no discrimination among customers.*

§ 175. 1. Where, by the course of a carrier's business, he is accustomed to deliver goods and parcels by means of porters or servants at the dwellings or places of business of the consignees, as was formerly the case, to a great extent, in England, and as is now done by express companies in this country, the carrier's re-

sponsibility continues, until an actual delivery to the consignee, or at his dwelling or place of business.[1] So, too, if the carrier deliver a parcel to a wrong person, without fault on the part of the owner, he is liable, as for a conversion.[2]

2. But this mode of delivery has no application to the ordinary business of railways as common carriers of goods. The transportation being confined to a given line, according to the ordinary and reasonable course of business, goods must be delivered and received at the stations of the company. And unless they adopt a different course of business, so as to create a different expectation, or stipulated for something more, there is no obligation to receive or to deliver freight in any other mode. But where such companies contract to receive or to deliver goods at other places, or where such is the course of their business, they are undoubtedly bound by such undertakings, or by such usage and course of business.[3]

[1] Hyde *v.* Trent & Mersey Navigation Co., 5 T. R. 389. In this case the carrier charged for cartage to the house of the consignee. In Stephenson *v.* Hart, 4 Bing. 476, it was considered a proper inquiry for the jury, "whether the defendants had delivered the box according to the due course of their business, as carriers." Golden *v.* Manning, 2 Wm. Bl. 916; 3 Wil. 429, 433. See also Bartlett *v.* Steamboat Philadelphia, 32 Mo. 256. In Tooker *v.* Gormer, 2 Hilton, 71, it is held, that where the goods are intrusted to a carrier with a bill to collect, he is liable for a delivery without exacting payment. Wardell *v.* Mountyan, 2 Esp. 693; Storr *v.* Crowley, M'Clel. & Y. 136.

[2] Duff *v.* Budd, 3 Brod. & B. 177. So, too, if the carrier deliver the goods at a different place from that named in the bill of lading, although one named in former consignments of the same parties. Sanquer *v.* London, &c. Railw., 16 C. B. 163; 32 Eng. L. & Eq. 338; Claflin *v.* Boston & L. Railw. Co., 7 Allen, 341. And the carrier may maintain an action in his own name for injury done to the property intrusted to him, and may recover the value of the property which he will hold in trust for the owner. Merrick *v.* Brainerd, 38 Barb. 574. But in an action for the non-delivery of the goods, the owner cannot recover for an injury to the goods. Nudd *v.* Wells & Co., 11 Wis. 407.

[3] Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. 186, 209; Noyes *v.* Rut. & Bur. Railw., 27 Vt. 110; 1 Parsons on Cont. 661. We here adopt Professor Parsons's note of the case (23 Vt. 186, *supra*). "This is one of the strongest cases in the books upon this point. The defendants were common carriers on Lake Champlain, from Burlington to St. Albans, touching at Port Kent and Plattsburg long enough to discharge and receive freight and passengers. This action was brought against them to recover for the loss of a package of bank-bills. It appeared in evidence that the package in question, which was directed to Richard Yates, Esq., Cashier, Plattsburg, N. Y., was delivered by the teller of the plaintiffs' bank to the captain of defendants' boat,

3. The cases to some extent regard the question, when the duty of the carrier ends, as one of fact or contract to be determined by

which ran daily from Burlington to Plattsburg, the captain delivered the package to one Ladd, a wharfinger, and that it was lost or stolen while in Ladd's possession. No notice was given by the captain of the boat to the consignee of the arrival of the package, nor had he any knowledge of it until after it was lost. The principal question in the case was, whether the package was sufficiently delivered to discharge the defendants from their liability as carriers. The defendants offered evidence to show that a delivery to the wharfinger, without notice, under the circumstances of the case, was a good delivery according to their own uniform usage, and the usage of other carriers similarly situated. The case has been before the Supreme Court of Vermont three times, and that court has uniformly held, that, in the absence of any special contract, a delivery to the wharfinger without notice, if warranted by the usage of the place, was sufficient, and discharged the defendants from all liability. When the case was before the court the last time, the court said, —

"The only difficulty which the court, from the first, have ever felt in this case has been in regard to the extent of the defendants' undertaking to convey the parcel; in other words, as to the extent and termination of the transit or carriage by the defendants. The county court, in the trial of this case, seem to have assumed that in the law of carriers there was a general well-defined rule upon this subject, and that the defendants were attempting to escape from its operation by means of some local usage or custom, in contravention of the general rules of law upon the subject. In this view of the case, the defendants were justly held to great strictness in the proof of the usage. It becomes, therefore, of chief importance to determine how far there is any such general rule of law as that which is assumed in the decision of the case in the court below. If the law fixes the extent of the contract, in every instance, in the manner assumed, then, most undoubtedly, are the defendants liable in this case, unless they can show, in the manner required, some controlling usage. But if, upon examination, it shall appear that there is no rule of law applicable to the subject, and the extent of the transit is matter resting altogether in proof, then the course of business at the place of destination, the usage or practice of the defendants, and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself. All the cases, almost without exception, regard the question of the time and place when the duty of the carrier ends as one of contract, to be determined by the jury from a consideration of all that was said by either party at the time of the delivery and acceptance of the parcels by the carrier, the course of the business, the practice of the carrier, and all other attending circumstances, the same as any other contract, in order to determine the intention of the parties. The inquiry, then, in the present case, must come to this before the jury, whether it was reasonable for the plaintiffs, under the circumstances, to expect the defendants to do more than to deliver the parcel to the wharfinger? If not, then that was the contract, and that ended their responsibility, and the plaintiffs cannot complain of the defendants because the wharfinger was unfaithful. The defendants, unless they have either expressly or by fair implication undertaken on their part to do something more than deliver the parcel

the jury, with reference to the mode of transportation, the special undertaking, if any, the course of business at the place, and other attending circumstances. It finally resolves itself often into the inquiry whether the carrier did all, in respect to the goods, which, under the peculiar duties of his office, the owner had a right to expect of him.[3]

4. But where the facts are not disputed, and the course of business of the carrier is uniform, the extent of the carrier's liability will become a question of law merely, as all such matters are under such circumstances.[3] And we understand the cases to have settled the question that the carrier by railway is neither bound to deliver to the consignee personally, or to give notice[3] of the arrival of the goods. But under peculiar circumstances, as for instance, when the goods arrive out of time; or having failed to arrive in time and the consignee having frequently called for them, and made the utmost inquiry for them for twelve days, not only at the point of destination but at all other places where they might possibly have been sent by mistake, when the freight-agent took his address and promised to give him notice whenever the goods should arrive, which occurred six days later and no notice was given; it was held, that under the circumstances, the defendants were bound to give notice, and that the promise of the freight agent was binding upon the company, any rule or custom of the office notwithstanding. But it was here considered

to the wharfinger, are no more liable for its loss than they would have been had it been lost upon ever so extensive a route of successive carriers, had it been intended to reach some remote destination in that mode. But if the plaintiffs can satisfy the jury that from the circumstances attending the delivery, or the course of the business, they were fairly justified in expecting the defendants to make a personal delivery at the bank, they must recover; otherwise, it seems to us, the case is with the defendants. . . .

"It might be consoling to the carriers and to others, if we could lay down a rule of law somewhat more definite in this case. But from the almost infinite diversity of circumstances, as to steamboat carriage, that is impossible. There will usually be at every place some fixed course of doing the business, which will be reasonable, or it would not be submitted to, and which will be easily ascertained on inquiry, and with reference to which contracts will be made, and which it is equally the interest and the duty of both parties to ascertain, before they make contracts, and which it would be esteemed culpable negligence in any one not to ascertain, so far as was important to the correct understanding of contracts which he was making." See also Barstow *v.* Murison, 14 La. Ann. 335; Gauche *v.* Storer, 14 La. Ann. 411; Gilkinson *v.* Steamboat Scotland, 14 La. Ann. 417; Garey *v.* Meagher, 33 Ala. 630; Hosea *v.* McCrory, 12 id. 349.

that the owner could not, under these circumstances, treat the goods as lost and recover accordingly.[4]

5. The rule of law, and the course of business, in regard to carriage by water have always been considered different from land carriage. In regard to foreign carriage, it is perfectly well settled that a delivery at the wharf, with notice, and some of the cases say even without notice, unless there be some special undertaking in the bill of lading, is sufficient. The consignee is presumed to have received from his correspondent a copy of the bill of lading, and is bound to take notice of the arrival of the ship.[5] A distinction has been attempted in some of the cases, between the foreign and internal and coasting carrying business, in regard to the delivery or landing upon the wharf, being sufficient to exonerate the carrier.[6]

6. But the cases all agree that in regard to carriers by ships and steamboats, nothing more is ever required, in the absence of special contract, than landing the goods at the usual wharf, and giving notice to the consignee, and keeping the goods safe a sufficient time after to enable the party to take them away. After that the carrier may put them in warehouse, and will only be liable as a

[4] Tanner *v.* Oil Creek Railw., 53 Penn. St. 411.

[5] Cope *v.* Cordova, 1 Rawle, 203, Opinion of *Rogers*, J.; Angell on Carriers, §§ 312, 313, *et seq.*; 2 Kent, Comm. 604, 605.

[6] Ostrander *v.* Brown, 15 Johns. 39, where it was held that such a deposit is not sufficient; but the carrier must continue his custody till the consignee has had sufficient time, after the landing of the goods and notice, to come and take them away. Hemphill *v.* Chenie, 6 Watts & S. 66; Barclay *v.* Clyde, 2 E. D. Smith, 95. If goods be consigned to a particular warehouse, a delivery at a pier in the place, but not at the warehouse, is not sufficient. Sultana *v.* Chapman, 5 Wis. 454. See also Sleade *v.* Payne, 14 La. Ann. 453, where the question of delivery and notice is considerably discussed. In a late case in the U. S. Circuit Court before Chief Justice *Chase*, the question is carefully examined, with the following result: The duty of a carrier by water is not fulfilled by simple transportation from port to port. The goods must be landed, and the consignee notified of their arrival. Where goods were landed from a vessel and stored in the carrier's storehouse until the consignee should call for them, but no notice of their arrival was given him, proof that such was the carrier's general custom will not relieve him from liability for damage to the goods after such storage, unless there is proof of assent by the owners to such arrangement. A contract of affreightment, to be performed upon tidal waters or navigable rivers wholly within the limits of a State, is a maritime contract within the admiralty jurisdiction of the courts of the United States. Owners of Mary Washington *v.* Ayres, 5 Am. Law Reg. (N. S.) 692.

depository, for ordinary neglect.[7] And the prevailing opinion seems to be, at the present time, that the necessity of giving notice of the arrival of the goods depends upon custom and usage, and the course of business at the place.[8] The course of doing business upon railways, their being confined to a particular route, having stated places of deposit, and generally erecting warehouses for the safe-keeping of goods, all seem to require that the same rule, as to the delivery of goods, should prevail, which does in transportation by ships and steamboats.[9] Accordingly it was held, that the proprietors of a railway, who are common carriers of goods, and when they arrive at their destination, deposit them in their warehouse, without additional charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers, for the loss of the goods by fire, without negligence or default on their part, after the goods are unladen from the cars, and placed in the warehouse, but are liable only for ordinary neglect as warehousemen. And it will make no difference, it is here said, in regard to the liability of the carriers, that the goods were destroyed by fire, in the warehouse, before the owner or consignee had opportunity to take them away.[10] This

[7] Garside *v.* Trent & Mersey Nav. Co., 4 T. R. 581; *In re* Webb, 8 Taunt. 443; s. c. 2 J. B. Moore, 500; 2 Kent, 605. See Dean *v.* Vaccaro, 2 Head, 488.

[8] Price *v.* Powell, 3 Comst. 323; Huston *v.* Peters, 1 Met. 558. But in Dean *v.* Vaccaro, *supra*, it is held that the usage or custom of a particular place cannot dispense with delivery or notice of the landing of the goods. See also Rowland *v.* Miln, 2 Hilton, 150, where it is held that a prevention of the landing of the goods by a person without legal authority does not relieve the carrier of his responsibility.

[9] Norway Plains Co. *v.* Boston & Maine Railw., 1 Gray, 263. Opinion of *Shaw*, Ch. J., 272. Opinion of court in Farmers' and Mech. Bank *v.* Champlain Transp. Co., 23 Vt. 211.

[10] Norway Plains Company *v.* Boston & Maine Railw., 1 Gray, 263. It is said, in this case, that the company is not obliged to give notice to the consignee of the arrival of the goods. Indeed, that point is virtually decided here. For if there is any obligation to give notice, there is also to keep the goods a sufficient time after, to enable the party to remove them. And in this case there was no opportunity to remove them, after the arrival. If there is any ground to question this decision, it is because there was no opportunity to remove the goods after their arrival. See Morris & Essex Railw. *v.* Ayers, 5 Dutch. 393. Where goods transported by a railroad arrive at the place of destination, and are placed upon the platform of the depot, at the usual place of discharging goods, ready for delivery to the consignee in good order, and he is notified of their

last proposition is perhaps not in strict accordance with most of the cases upon the subject under analogous circumstances. In a late case in New Hampshire,[11] the rules of the liability of the carrier and the warehouseman are both stated differently somewhat from that laid down in the last case. In regard to the liability of the carrier, as such, it is said it will continue till discharged, "by a delivery of the goods to the bailor, or a tender or offer to deliver them, or such act as the law regards as equivalent to a delivery, as for instance in some cases, by depositing them in the warehouse of a responsible person." No intimation is here given that a deposit merely in the carrier's own warehouse is sufficient to release the carriers. And in a recent case in Wisconsin,[12] it was decided that the consignee must have a reasonable opportunity to remove the goods after their arrival, before the carrier's duty as such terminates; but the question of reasonable time for that purpose will not be affected by any peculiarity in the condition of the consignee making it convenient to have a longer time than under other and ordinary circumstances. But where the goods arrived at the station about sundown Saturday, and were taken from the cars and placed in the warehouse of the company about dark, and the warehouse closed a few minutes after, and before Monday burnt with the goods, without the fault of the company, the plaintiff residing about three-fourths of a mile from the station, and his teamster

arrival and pays the freight upon them, the liability of the company as carriers is at an end. If the consignee does not receive the goods, it seems that the carrier must take care of them for a reasonable time for the consignee, but his liability in that respect is that of a warehouseman and not that of a carrier. But where the consignee has notice of the situation of the goods at the place of delivery, and pays the freight upon them, and afterwards without neglect on the part of the warehouseman the goods are destroyed, the warehouseman is not liable. It seems, indeed, that the payment of the freight under such circumstances, without any arrangement as to the further custody of the goods by the warehouseman, is equivalent to a delivery so far as to throw the risk of loss upon the consignee. New Albany & Salem Railroad Co. *v.* Campbell, 12 Indiana, 55.

[11] Smith *v.* Nashua & Lowell Railw., 7 Foster, 86.

[12] Wood *v.* Crocker, 18 Wis. 345. See also Ala. & Tenn. Rivers Railway *v.* Kidd, 35 Ala. 209, where the same general rule of responsibility for goods after arrival at the place of destination is maintained. It is also said, that if the carrier specially undertake for warehousing, he is responsible for the neglect of any warehouseman to whom he delivers the goods, and the carrier will be bound to warehouse according to his general and well-known custom, but cannot excuse himself by a usage of a few weeks not generally known or to the consignee.

having called for the goods about three o'clock of that afternoon, and being told by the freight agent that he need not come again that day, as it would be late before the train would arrive, but about dusk he was informed that the goods had come, it was held the company were liable as common carriers.

7. And upon principle, it seems more reasonable to conclude, that the responsibility does not terminate, until the owner or consignee, by watchfulness, has had, or might have had, an opportunity to remove them. This is certainly so to be regarded, if the building of warehouses by railways is to be considered part of their business as carriers, and for their own convenience. It seems to be settled that the depositing of freight in their warehouses, at the time of receiving it, is to be so regarded, unless there are special directions given, and that the responsibility of the carrier attaches presently upon the delivery.[13]

8. There is then no very good reason, as it seems to us, why the responsibility of the carrier should not continue, until the owner or consignee, by the use of diligence, might have removed the goods. The warehousing seems to be with that intent, and for that purpose. And if we assume, as we must, we think, that there is no obligation upon railway carriers to give notice of the arrival of the goods, there does still seem to be reason and justice in giving the consignee time and opportunity to remove the goods, by the exercise of the proper watchfulness, before the responsibility of the carrier ends. In the case of Smith *v.* Nashua & Lowell Railway,[11] it is held that there is no duty upon railway carriers to store goods after the consignee has notice of their arrival, and reasonable time to remove them. Of course, then, there is no absolute duty to keep warehouses, provided the company choose to give notice of the arrival of goods, in every case, and suffer them to remain in their cars until the consignee has reasonable opportunity to remove them. It is only for their own convenience in keeping goods, to be carried, till the train is ready to depart, or after their arrival until the consignee has reasonable opportunity to remove them. After that there is no doubt the carrier's responsibility as such, ceases, and if the goods remain in the warehouse of the company, it is only with the responsibility of ordinary

[13] *Ante*, § 174, and cases cited; McCarty *v.* New York & Erie Railw., 30 Penn. St. 247.

bailees for hire, as held in Norway Plains Co. *v.* Boston & Maine Railway,[10] or as was held in Smith *v.* Nashua & Lowell Railway,[11] with the responsibility of a bailee without compensation. The former degree of responsibility seems to us the just and reasonable one, as it is an accessory of the carrying business, and the carrier, after he becomes a warehouseman, is no doubt fairly entitled to charge, in that capacity. The omission to charge for warehousing in the first instance, being the result of the course of the business, and because it is a part of the carrier's duty to keep the goods safely till the consignee has opportunity, by the use of diligence, to remove them. And this seems to us the extent of the decision in Thomas *v.* Boston & Providence Railway.[14] This point is there very distinctly stated, by *Hubbard*, J.: "And where such suitable warehouses are provided, and the goods *which are not called for on their arrival at the places of destination*, are unladed, and stored safely in such warehouses, the duty of the proprietors, as common carriers, is, in our judgment, terminated."

9. But when the same rule is applied to goods, arriving out of time, and before the consignee could have removed them, reason and justice seem to us to require that if the company put them into their warehouse, for their own convenience, their responsibility as carriers should not be thereby terminated, until the consignee has reasonable opportunity to remove them.[15] We should therefore

[14] 10 Met. 472. In this case the action was for one roll of leather, out of four lost in the defendants' warehouse. The four rolls arrived upon the train, and were deposited in the warehouse. The freight was paid on the whole, and the whole pointed out to the teamster, who called for them at the depot, and he carried away but two of them. After this the loss occurred, and there could be no manner of doubt whatever that the goods were remaining in the warehouse for the convenience of the owner, and after a reasonable time for their removal had elapsed. There could be no question whatever that the decision is fully justified, and that it comes fairly within the principle of the case of Garside *v.* Trent & Mersey Nav. Co., 4 T. R. 581, upon the authority of which it professes to go. See also Hilliard *v.* Wilmington, 6 Jones Law, 343.

[15] Michigan Central Railw. *v.* Ward, 2 Mich. 538. In this case, notice of the arrival of the goods is held necessary to terminate the responsibility of the carrier. But the statute in this State provides, that the responsibility of the carrier shall cease, as such, after notice of the arrival of the goods a sufficient time to enable the consignee to remove them, and the court considered, that, by consequence, it will continue till that period. And in Rome Railw. *v.* Sullivan, 14 Ga. 277, the same rule in regard to notice is adopted upon general principles.

The former case was an action to recover the value of wheat carried, by the

have felt compelled to rule the case of Norway Plains Co. *v.* Boston & Maine Railway in favor of the plaintiffs. But in justice to

plaintiffs in error, from Kalamazoo to Detroit, and there destroyed by fire directly after it was received in their warehouse. The court acknowledge the general duty of carriers to make personal delivery to the consignee, and say: "But to this general rule there are many exceptions. With great force and reason the law implies an exception to that large class of common carriers whose mode of transportation is such as to render it impracticable to comply with this rule; it embraces all carriers by ships, and boats, and cars upon railways. These must necessarily stop at the wharves and depots on their respective routes, and consequently personal delivery would be attended with great inconvenience, and therefore the law has dispensed with it. But in lieu of personal delivery, which is dispensed with in this class of carriers, the law requires a notice, and nothing will dispense with that notice."

And in a late case in New Hampshire, which has come to hand since writing the foregoing, we understand the court to take precisely the same view stated in the text. The case is Moses *v.* Boston & Maine Railw., 32 N. H. 523, and was, where a quantity of wool arrived at the company's station, the place of its final destination, about three o'clock in the afternoon. In the usual course of business, from two to three hours were required to unload the freight from the cars into the warehouse, and the gates were closed at five o'clock, so that no goods could be removed from the warehouse after this hour, until the next morning. During the night the warehouse and the wool therein were destroyed by fire.

It was held, that the responsibility of railway companies, as common carriers, for goods transported by them, continues until the goods are ready to be delivered at the place of destination, and the owner or consignee has had a reasonable opportunity, during the hours when such goods are usually delivered there, of examining them so far as to judge from their outward appearance whether they are in proper condition, and to take them away.

But it was held, that the consignee must take notice of the course of business at the station, and the time of the arrival of the train when his goods may be expected, and be ready to receive them in a reasonable time after their arrival, and when in such common course of business they may fairly be expected to be ready for delivery.

That upon the facts in this case the jury were warranted in finding that the consignee had not a reasonable opportunity to take the wool into his possession before the fire, and that defendants were liable therefor as common carriers, notwithstanding it might be proved by them, that, before the fire the wool had been placed upon the platform in the warehouse from which such goods were usually delivered, separate from other goods, and ready to be delivered.

In this case, and in a case between the same parties (4 Foster, 71), it is held, that the common-law liability of the carrier as to goods in his warehouse, before and after the transportation, cannot be restricted by a mere notice brought home to the knowledge of the owner.

While goods are in warehouse, after their arrival at their place of destination, and are carried away by some one by mistake, and without the fault of the company's agents, they are not liable. But if the company's agents deliver them,

the very elaborate opinion of *Shaw*, Ch. J., who has perhaps no superior upon this continent, as a wise and just expositor of the law, as a living and advancing study, we shall give the substance of it in his own words.[16] We may be allowed to say that it seems

either positively or permissively, to the wrong person, by mistake, the company are liable. And they are *prima facie* liable for non-delivery, and the burden of proof is upon them to show that the goods were lost without their fault, although they may not be able to show precisely the manner of the loss. Lichtenhein *v.* Boston & Providence Railw., 11 Cush. 70. See Mil. & Miss. Railw. *v.* Fairchild, 6 Wis. 403.

In the case of Chicago & Rock Island Railw. *v.* Warren, 16 Ill. 502, it was held, that common carriers could not relieve themselves of their liability, as such, by depositing the goods in warehouse, until this was evinced by some open and distinct act. As if the storage were to be in the car, that must be separated from the train, and placed in the usual place for storage, in the care of a proper person, and that the proof of this change rested upon the carrier. *Scates*, Ch. J., says: "Goods may not be thrown down in a station-house or on a platform, at their destination, in the name and nature of delivery. The responsibility of the carrier must last till that of some other begins, and he must show it."

In Crawford *v.* Clark, 15 Ill. 561, it was held, that carriers by water, on landing goods, must give notice to the consignee or owner, and if he refuse to accept them, the carrier must safely secure them or he will be responsible for all loss or damage. And when the carrier had agreed to deliver goods in Pittsburgh, but kept them at his warehouse in Alleghany, to which he had removed some months before, as was the custom of the trade, until the aqueduct at Pittsburgh was completed, where the goods were destroyed by fire, without his fault, he was held responsible for the loss. Gaff *v.* Bloomer, 9 Penn. St. 114.

But where the carrier was directed to make sale of the goods at the point of destination, and after their arrival they were placed upon deck, exposed for sale, and while in that state a portion was stolen without the fault of the carrier, he was held not responsible. Labar *v.* Taber, 35 Barb. 305.

[16] This action was to recover the value of two parcels of merchandise forwarded by plaintiffs to Boston, in cars of defendants. The goods are described in two receipts of defendants, dated at Rochester, N. H., one October 31, 1850, the other November 2, 1850. The goods specified in the first receipt were delivered at Rochester, and received into the cars and arrived seasonably in Boston on Saturday, the 2d of November, and were then taken from the cars and placed in the warehouse of defendants; no special notice was given to plaintiffs, or their agents, but the fact was known to Ames, a truckman, who was their authorized agent employed to receive and remove the goods; they were ready for delivery at least as early as Monday morning, the 4th of November, and he might then have received them. The goods specified in the other receipt were forwarded to Boston on Monday, the 4th of November; the cars arrived late. Ames, the truckman, knew, from inspection of the way-bill, that the goods were on the train, and waited some time, but could not conveniently receive them that afternoon in season to deliver them at the places to which they

to us, the opinion and argument of the learned chief justice might, for the most part, be quite as well applied to the rule for which we contend, as to have reached the result which it did.

were directed, and for that reason did not take them. In the course of the afternoon they were taken from the cars and placed on the platform within the depot. At the usual time at that season of the year the doors were closed. In the night the depot was burned and the goods destroyed by an accidental fire. The fire was not caused by lightning, nor was it attributable to any default, negligence, or want of due care on the part of defendants or their agents. . . . The question is, whether, under these circumstances, defendants are liable for the loss of the goods.

"If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity, as warehousemen, then they were responsible only for the care and diligence which the law attaches to that relation, and this does not extend to a loss by accidental fire, not caused by the default or negligence of themselves or their servants. The question then is, when and by what act the transit of the goods terminated. It was contended in this case, that in the absence of special contract, or evidence of a local usage, &c., to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery. This rule applies very properly to the case of goods carried by wagons, and other vehicles traversing the comman highways and streets, and which, therefore, can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea in this respect, that, from the very nature of the case, the merchandise can only be transported along one line and delivered at its termination, or at some fixed place by its side at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of *Buller*, J., in Hyde *v.* Trent and Mersey Navigation Co., 5 T. R. 397: 'A ship trading from one port to another has not the means of carrying the goods on land, and according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carriers.' The court are of opinion that the duty assumed by the railroad is — and this being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute an implied contract between them, — that they will carry the goods safely to the place of destination and there discharge them on the platform, and then and there deliver them to the consignee or the party entitled to receive them; if he is then and there ready to take them forthwith, or, if the consignee is not then ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers and of the contract between the parties when not altered or modified by a special agreement. . . . 'This we consider to be one entire contract for hire, and although there is no separate charge for storage, yet the freight fixed by the company to be paid as a compensation for the whole service, is paid as well for the temporary storage as for the carriage. This renders both services,

10. And where the consignee called for the goods after their arrival, and the station agent told him they were not there, and in

as well the absolute undertaking for carriage, as the contingent undertaking for storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of carriers by railroad, we think there result two distinct liabilities: first, that of common carriers, and afterwards that of keepers for hire, or warehouse-keepers, the obligation of each of which is regulated by law. We may say then, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts, or, in analogy to the old rule that delivery is necessary, it may be said that delivery by themselves as common carriers to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence.'

"Indeed the same doctrine is distinctly held in Thomas *v.* Boston & Providence Railw., 10 Met. 472, with the same limitation. The point that the same company, under one and the same contract, may be subject to distinct duties for a failure in which they may be liable to different degrees of responsibility, will result from a comparison of the two cases of Garside *v.* Trent & Mersey Navigation Co., 4 T. R. 581, and Hyde *v.* Same, 5 id. 389. See also Van Santvoord *v.* St. John, 6 Hill, 157; McHenry *v.* Phila., Wil., &c. Railroad, 4 Harring. 448. In the case of *In re* Webb, 8 Taunt. 443, which was where common carriers agreed to carry wool from London to Frome, under a stipulation that when the consignees had not room in their own store to receive it, the carriers without additional charge would retain it in their own warehouse until the consignee was ready to receive it, wool thus carried and placed in the carrier's warehouse was destroyed by an accidental fire, it was held that the carriers were not liable. The court say this was a loss which would fall on them as carriers, if they were acting in that character, but would not fall on them as warehousemen." . . . "This view of the law applicable to railroad companies as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform, and if on account of their arrival in the night, or at any other time when by the usage or course of business the doors of the merchandise depot or warehouse are closed, or for any other cause they cannot then be delivered, or if for any reason the consignee is not there ready to receive them, it is the duty of the company to store them safely under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them, and for the performance of these duties after the goods are delivered from the cars, the company are liable as warehousemen or keepers of goods for hire." . . . . "It was argued in the present case that the railroad company are responsible as common carriers of goods, until they have given notice to the consignees of the

consequence they were not removed, but were destroyed by fire the same night, it was held the company were liable.[17]

11. And where the agent of the consignee requested the agent of the company to suffer the car in which was a block of marble, transported by them, to be removed to the depot of another railway, and he assented, and assisted in the removal of the car, and after the removal the agent of the consignee procured the use of the machinery of the second company to unload the block, which was broken through defect of such machinery, it was held the first company were not liable for such injury, and that their responsibility terminated when the marble was taken from their station, that being a virtual delivery to the consignee.[18] And the responsibility of the carrier, as such, will not continue beyond a reasonable time to remove the goods, because he gives notice of the arrival, and requires the consignee to remove them within twenty-four hours,[19] there being no obligation, as common carriers, either to give notice of the arrival or to keep the goods beyond the shortest convenient time after their arrival to enable the consignee to

arrival of the goods. The court are strongly inclined to the opinion, that in regard to the transportation of goods by railroads, as the business is generally conducted in this country, the rule does not apply. The immediate and safe storage of goods on their arrival in warehouses provided by the railroad companies, and without additional expense, seems to be a substitute better adapted to the convenience of both parties."

[17] Stevens *v.* Boston & Maine Railw., 1 Gray, 277.

[18] Lewis *v.* Western Railw., 11 Met. 509. And in Kimball *v.* Western Railw., 6 Gray, 542, it was held that the company were liable for ordinary care and skill in unlading goods from their cars, even in cases where, by their regulations, it was made the duty of the consignees to unlade them within twenty-four hours after their arrival, and this was known to the consignee, who also had notice of the arrival of the goods more than twenty-four hours before the time of their being unloaded by the company's servants, and that if goods were, under such circumstances, injured by the want of such care and skill, the company were liable.

And in the absence of all contract or usage for the consignee to unlade the goods from ships, boats, or cars, and especially where they are bulky, and of great weight, it seems reasonable that the carrier should assume the risk of unlading, under his responsibility as carrier. Such is the general course of the carrying business. The carrier is bound to provide himself with suitable and safe machinery for unlading, and where he used the machinery of third parties at his own suggestion for that purpose, he was held liable for its sufficiency. De Mott *v.* Laraway, 14 Wend. 225.

[19] Richards *v.* Michigan S. & N. Indiana Railw., 20 Ill. 404.

remove them.[20] And in the mean time, no distinct charge for warehousing could properly be made; but after the duty of the carrier is fully performed, and the goods are allowed to remain in the company's warehouse for any considerable time, there is no good reason why they may not charge for warehouse services.[21] But the onus of proof is always upon the company to show that their responsibility as carriers had terminated before any loss or damage occurred.[22] The charter of the Michigan Central Railway Company empowers them to charge storage on all goods suffered to remain at their stations more than four days after arrival, except in Detroit, where the time is limited to twenty-four hours, and the company are required to notify the consignee four days or twenty-four hours, in either case, before they charge storage, and the company are made responsible for goods awaiting delivery, as warehousemen, and not as carriers. It was held that property on deposit at their stations, was to be considered as awaiting delivery as soon as it was in a condition to be delivered to the consignee. The office of the notice is to fix the time for charging storage. It has no effect to extend the carrier's responsibility, as such, but does necessarily restrict it to the commencement of the duty as warehousemen, at the furthest.[23]

12. Questions of some difficulty often arise, in regard to the custody of goods in warehouse, at intermediate stations, where there is no connection between the different routes over which the goods pass. We shall see that the general duty, in such cases, in this country especially, is, to carry safely, and deliver to the next carrier upon the route.[24] But cases will occur where there will be delay in effecting the connection. In such cases there can perhaps be no better rule laid down than that found in the opinion of *Buller*, J., in Garside *v.* Trent and Mersey Navigation Company,[25]

[20] Porter *v.* Chicago & Rock Island Railw., 20 Ill. 407; Davis *v.* Michigan S. & N. Indiana Railw., id. 412; Illinois Central Railw. *v.* Alexander, id. 23.

[21] Illinois Central Railw. *v.* Alexander, *supra*.

[22] Wardlaw *v.* South C. Railw., 11 Rich. Law, 337.

[23] Michigan Central Railw. *v.* Hale, 6 Mich. 243.

[24] *Post*, 180, and cases cited. In Converse *v.* Norwich & N. Y. Transp. Co., 33 Conn. 166, it was held that where the subsequent carrier uniformly received freight from the connecting line on a particular platform by the side of the line, a delivery at that point fixed the responsibility of that carrier, and discharged the former one.

[25] 4 T. R. 583. And in every case where a warehouseman or forwarding

which was a case precisely of this character. "The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly; and it was only because there was no person ready at Manchester to receive these goods that the defendants were obliged to keep them."

13. But as a general rule, where the next carrier in the connection has a place of receiving goods, as in the case of railways, always open, and agents ready to receive them, it would probably be the duty of each preceding carrier to make immediate delivery at the place of receiving freight to the next succeeding carrier, in the line. And as this fixes, ordinarily, the carrier's liability,[26] in this mode a continuous liability of carriers is kept up throughout the line, which it seems to us is the true policy of the law upon this subject, where it can fairly be done, and without injustice to any particular carrier.

14. Difficult questions often arise, too, in this connection, where the goods are directed, at an intermediate station in the course of their transit, to the care of persons who sustain the double capacity of forwarding merchants and carriers. In such cases they are more commonly held liable as carriers, the consignment being presumed to have been made to them in that capacity.[27]

15. And where a package delivered to a common carrier for transportation, is addressed to the care of the agent and principal representative of the carrier at the point where the carriage is to terminate, this will not make such agent the consignee of the goods, so as to terminate the carrier's responsibility upon delivery to him.[28]

merchant ships goods, it is his duty to advise the consignee of it immediately. Railey v. Porter, 32 Mo. 471.

[26] *Ante*, § 174, pl. 4.

[27] Teall v. Sears, 9 Barb. 317. This case is where goods were shipped from Albany upon the canal, with the accompanying bill of lading: —

"Three cases of goods, A. B. Chase, Chicago, by vessel, care of Sears & Griffith, Buffalo," and were received at Buffalo by Sears & Griffith, who were principally employed in the commission and forwarding business, but had some slight interest in transportation on the lakes, west, and who forwarded these goods to Chicago, by a transient vessel. Suit being brought against them for one case of the goods which did not arrive, it was held that they were liable as carriers and not as forwarding merchants merely.

[28] Russell v. Livingston, 16 N. Y. 515.

16. And where goods have been tendered to the consignee and refused by him, there is no rule of law that the carrier is bound to give notice to the consignor; he is only bound to do what is reasonable, and that is a question for the jury under all the circumstances.[29]

17. In one case,[30] where the subject is very extensively discussed in the Exchequer Chamber before all the judges, and where the opinions are delivered *seriatim* with but slight disagreement, a parcel was tendered to the consignee, and not being accepted was sent back to the consignor without reasonable delay, as the jury found. About two hours after it was first tendered to the consignee, he called for it, and tendered all charges claimed, but was told it had been returned to the consignor. The jury found that the tender of the charge for the carriage was made within a reasonable time after the parcel had been refused. It was held that the carrier was liable for a breach of duty, even supposing his duty as carrier ended by the tender of the parcel. The judges here put stress upon the fact that the carrier should do what is reasonable in such cases, what will be most likely to be for the interest of the owner.

18. It seems to be settled in the American courts, that where the consignee cannot be found or refuses to accept the goods, the carrier is not in general at liberty to abandon them or remove them to any remote place. He is bound to keep them as carrier, until the owner or consignee, by the use of diligence, has time to remove them, when his duty as carrier ceases.[31] After that he is bound to keep them as a careful and prudent man would be likely to keep his own goods of the same class, and according to his means. It is not always that the carrier is provided with ample means of warehousing goods after his duty as carrier is ended. But he should do the best his means will enable him to do, and his means should be reasonable according to his usual business.[32]

[29] Hudson *v.* Baxendale, 2 H. & N. 575.

[30] The Great Western Railw. *v.* Crouch, 3 H. & N. 182; s. c. *post*, § 188, pl. 16, and note.

[31] *Ante*, § 175, pl. 8.

[32] Ostrander *v.* Brown, 15 Johns. 39; Hemphill *v.* Chenie, 6 W. & S. 62; Moses *v.* Boston & Maine Railw., 32 N.H. 523; Smith *v.* Nashua & L. Railw., 7 Foster, 86; Eagle *v.* White, 6 Wharton, 505.

19. There seems to be no question but that the carrier will be justified in putting goods not called for in a reasonable time where no duty of personal delivery or giving notice exists; and also such goods as are not accepted by the consignees, into warehouse. And this he may do in his own warehouse or that of others, according to the usual course of business at the point.[33]

20. If a carrier by water cannot find the consignee, or his agent, at the port of destination, he may exonerate himself from further responsibility, by delivery to a responsible warehouseman. And where this is done, the warehouseman paying all of the charges of the carrier, the intendment of law is, in the absence of all evidence to the contrary, that the bailment is made on behalf of the consignee, and it will be so regarded, even where the goods are never called for; and the carrier cannot reclaim the goods on repayment of the charges.[34]

21. In a recent English case, where cattle arrived at the point of destination on Sunday, and by law, could not be removed until after midnight, it was held, the responsibility as carrier ceased upon the arrival of the train, and placing the cattle in condition to remain, until they could be removed. *Martin*, B., dissenting. Upon principle the law would seem to be with the dissenting judge, since the owner could not remove the goods until after midnight, and in the mean time the risk should fall upon the carrier, if there was no fault of the owner.[35]

22. The general principle, that the carrier's responsibility continues throughout the transitus, in all modes of transportation, is most unquestionable.[36] And in the early cases, where the consignees are not ready to accept, the precise point of termination is fixed at the moment when the crane of the warehouseman is attached to raise the goods into the warehouse.[37]

[33] Thomas *v.* Boston & Prov. Railw., 10 Met. 472; Fisk *v.* Newton, 1 Denio, 45; McCarty *v.* New York & Erie Railw., 30 Penn. St. 247, 250; Goold *v.* Chapin, 10 Barb. 612; Farmers' & M. Bank *v.* Champlain Transp. Co., 23 Vt. 186, 211; Norway Plains Co. *v.* Boston & Maine Railw., 1 Gray, 263; Chicago & Rock Island Railw. *v.* Warren, 16 Illinois, 502; Bansemer *v.* T. & W. Railw., 25 Ind. 434.

[34] Hamilton *v.* Wilkinson, 11 Allen, 308. If the carrier desire to make a bailment on his own behalf, he should make it special.

[35] Shepherd *v.* Bristol & Exeter Railw., Law Rep., 3 Exch. 189; *ante*, § 175, pl. 7, 8, and cases cited.

[36] Coates *v.* Railton, 6 B. & C. 422; Crawshay *v.* Eades, 1 id. 181.

[37] Thomas *v.* Day, 4 Esp. 262; Quiggin *v.* Duff, 1 M. & W. 174.

23. It has been held that the carrier cannot excuse himself for non-delivery of the goods on the ground of unlawful seizure of the same by government officers,[38] nor on the ground of an invalid claim of lien.[39] Nor will a lawful seizure and condemnation by the courts of a foreign country be any excuse to the carrier, the owner not being in fault.[40]

24. Delivery to the consignee must be according to the course of business and the usages of the trade at the port of destination. It may be by delivery on board the lighter,[41] or by depositing the goods on the wharf of the warehouseman, wharfinger, or of the consignee or owner.[42] But a delivery or tender of the goods must be in a reasonable time, place, and manner, of which the jury are the judges.[43] And if goods are tendered after the close of business hours, or when the owner cannot receive them, the carrier is not thereby released.[44]

25. But if goods are tendered in proper time, place, and manner, to the owner or consignee and refused, the carrier is released, as such, and is thereafter only responsible as an ordinary bailee. And it will not prevent this result, that the tender is made on a fast day, appointed by the Governor of the State, it not being made a public holiday by the laws of the State.[45]

26. But any reasonable arrangements between the carrier and the consignee as to the mode of delivery, will be held binding, and the carrier exonerated by delivery in the mode thus stipulated.[45] And he will be held responsible for any injury to the goods resulting from not delivering in conformity with the arrangements.[46]

27. It seems to be the settled rule, in regard to carriers by water, that they must make delivery at the proper wharf, and

[38] Gosling *v.* Higgins, 1 Camp. 451.

[39] Stoer *v.* Crowley, M'Clel. & Y. 136. If the carrier offer the goods at the house of the consignee, and is compelled to carry them back to the warehouse because the hire is not ready to be paid, he may treat his responsibility, as carrier, as terminated. But if both parties treat it as continuing until actual delivery, he is responsible until that event, in his capacity of carrier. Ib.

[40] Spence *v.* Chodwick, 10 Q. B. 517; Atkinson *v.* Ritchie, 10 East, 530.

[41] Strong *v.* Natally, 1 Bos. & Pul. (N. R.) 16.

[42] Blin *v.* Mayo, 10 Vt. 56.

[43] Hill *v.* Humphreys, 5 Watts & S. 123; Segura *v.* Reed, 3 La. Ann. 695.

[44] Hatham *v.* Ely, 28 N. Y. 78.

[45] Richardson *v.* Goddard, 23 How. (U. S.) 28.

[46] The Grafton, 1 Blatch. C. C. 173.

either give notice to the owner or consignee, in time to enable him to take charge of the goods, or else put them in safe custody and warehouse, so that they can be safely preserved, until the person interested can remove them, or assume charge himself.[47] And it will not excuse the carrier, that the master of the vessel wrongfully refused to sign bills of lading, and is therefore ignorant of the names of the consignees,[48] or that, for any other reason, the carrier is ignorant of the names or residence of the consignees.[49] But this general rule will be controlled by the express direction of the consignor,[50] and by the custom of the trade, or the usage of the particular place, but that should very distinctly appear; otherwise, the general reasonableness of the rule, that timely notice shall be given the consignees, or else the goods put in safe condition to remain until called for, will prevail.

28. And it has been held by the English courts, that the carrier by railway has no right to impose a charge for the conveyance of goods to and from the station, where the customer does not require such service to be performed by him.[51]

29. The English statute prohibiting carriers from making any discrimination for or against any of their customers, will not allow them to keep their goods' station open for the delivery of goods after their usual time of closing it, as to other persons,[51] or of carrying for particular ones who have large amounts of freight, at prices below their usual rate.[51]

[47] The Peytona, 2 Curtis, C. C. 21; Scholes *v.* Ackerland, 15 Ill. 474; Segura *v.* Reed, 3 La. Ann. 695; Herman *v.* Goodrich, 21 Wisc. 536.

[48] The Peytona, *supra*.

[49] Galloway *v.* Hughes, 1 Bailey, 553.

[50] Ide *v.* Sadler, 18 Barb. 32.

[51] Garton *v.* Bristol & Exeter Railw. Co., 6 C. B. (N. S.) 639. See also Ransome *v.* Eastern Counties Railw. Co. 1 C. B. (N. S.) 437, 2 Law T. (N. S.) 376; s. c. 6 Jur. (N. S.) 908.

SECTION X.

Payment of Freight. — General Duty of Carriers. — Equality of Charges. — Special Damage.

1. *Bound to carry for all who apply.*
2. *May demand freight in advance. Refusal to carry excuses tender.*
3. *Payment of freight and fare will sometimes be presumed.*
4. *What will excuse carrier from carrying, or delivery.*

n. 15. *Equality of charges.*

5. *Goods may be rated according to custom.*
6. *Must carry in the order of receipt.*

§ 176. 1. It is a well settled principle of the law applicable to common carriers, both of goods and passengers, that they are bound to carry for all persons who apply, unless they have a reasonable excuse for the refusal to do so.[1] Carriers of goods and passengers, who set themselves before the public as ready to carry for all who apply, become a kind of public officers, and owe to the public a general duty, independent of any contract in the particular case.[2]

2. The carrier is entitled to demand his pay in advance, but, if no such condition is insisted upon at the time of the delivery of the goods, the owner is not obliged to tender the freight, nor in an action is it necessary to allege more than a willingness and readiness to pay a reasonable compensation to the carrier.[3] Where

[1] Benett *v.* Peninsular Steamboat Co., 6 C. B. 775; Story on Bailm. § 591; Jencks *v.* Coleman, 2 Sumner, 221, 224. But a carrier from one place to another is not bound to carry between intermediate places. Thurman *v.* Wells, 18 Barb. 500.

[2] Bretherton *v.* Wood, 3 Brod. & B. 54; s. c. 9 Price, 408.

[3] Bastard *v.* Bastard, 2 Shower, 81. It is here said, "For perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his hire." Lovett *v.* Hobbs, id. 129, and notes; Rogers *v.* Head, Cro. Jac. 262. Jackson *v.* Rogers, 2 Shower, 327, decides the general principle of the carrier being liable to an action if he refuse to carry goods, "though offered his hire," if "he had convenience to carry the same," which seems to presuppose that both are conditions of the liability. Pickford *v.* The Grand Junc. Railw., 8 M. & W. 372; Galena & Chicago Railw. *v.* Rae, 18 Ill. 488. Where payment has been made in advance, it cannot be required to be paid over again to another party, who has carried the goods without authority. But where payment is not made in advance to the first carrier, and he employs a second, the latter has a lien on the goods for his charges. Nordemeyer *v.* Loescher, 1 Hilton, 499.

It is said in Skinner *v.* Chicago & Rock Island Railw. Co., 12 Iowa, 191, that a railway company has the right to require a receipt of the consignee showing that the goods were in good order when delivered, and that the consignee has an

one is bound to perform, upon payment, even though entitled to demand payment in advance, a refusal to perform the act excuses any tender of the compensation. All that is necessary to be averred or proved in such case is a willingness and readiness to pay when the other party is entitled to demand pay, which, in the case of the carrier, is not till he accept the goods and assume the duty of his office.[4] When, according to the common course of business, carriers do not require pay in advance, freight is not expected to be paid, unless required, in advance, and the omission will not excuse the carrier, in such cases. Indeed, in one case it was held that the carrier could not rid himself of his common-law liability by waiving compensation, where the right to demand it existed.[5] But, where freight is actually paid in advance, it would seem that the last carrier should not be allowed to insist upon any charge beyond the amount paid. But where a less sum than the regular tariff is paid, and the last carrier is required to advance for former freight a sum, which, together with his own, exceeds that which had been paid, it was held he might demand the balance before surrendering the goods.[6]

3. It is said that payment of fare will be presumed to have been made according to the common course of business upon the route.[7] And although this has been questioned,[8] it is certain that such an inference, as matter of fact, will be very obvious, in the case of passengers upon railway trains, and we do not perceive any reasonable objection to the rule as one of presumption of fact, which for its force must depend upon circumstances, to be judged of by the jury.

4. As before stated, a carrier is not bound to receive goods which he is not accustomed to carry, or when his means of con-

equal right to examine the goods before executing the receipt, and that such examination should be made at the place of delivery and before removal. But the ordinary receipt upon the books of the express company required by the agent at the very moment of delivery, without giving any opportunity for inspection, could have no implication against the owner for a subsequent claim for damages by reason of the default of the company.

[4] Rawson *v.* Johnson, 1 East, 203; 2 Kent, Comm., 598, 599, and note.

[5] Knox *v.* Rives, 14 Alabama, 249, 261, opinion of court, by *Chilton*, J.

[6] Wells *v.* Thomas, 27 Mo. 17.

[7] McGill *v.* Rowand, 3 Penn. St. 451.

[8] 1 Parsons on Cont. 649; *ante*, § 171, pl. 4.

veyance are all employed, or before he is ready to depart,[9] or where the property is publicly exposed to the depredations of the mob,[10] or where the goods are not safe to be carried.[11] So, too, the carrier may excuse himself by showing that the loss happened through the fraud or negligence of the owner of the goods in packing, or otherwise, or from internal defect, without his fault.[12] So, where one who was bailee of goods to book them with the defendants, stage proprietors and common carriers of parcels, to carry to London, instead of doing so, put them in his own bag, which the defendants lost, it was held he could not recover the value of the parcel.[13] So, too, if the loss happen partly through the negligence of the owner, and partly through that of the carrier, he is not liable unless, perhaps, where the owner's negligence is not the proximate cause of the loss.[14] The carrier cannot refuse to carry a parcel because the owner refuses to disclose the

[9] *Arguendo*, in Lane *v.* Cotton, 1 Ld. Ray. 652; Morse *v.* Slue, 1 Ventris, 190, 2 Lev. 69. But if he do accept the delivery, he is liable as a common carrier. Barclay *v.* Cuculla-Y-Gana, 3 Doug. 389; Wibert *v.* N. Y. & Erie Railw., 19 Barb. 36.

[10] Edwards *v.* Sheratt, 1 East, 604. And it was held erroneous, to instruct the jury, that press of freight will not, in ordinary times, excuse the carrier, being a railway company, from carrying freight forward without delay, where such press had existed for a long time, and was not notified to the consignee. Peet *v.* Chicago & N. W. Railw., 20 Wisc. 594.

[11] Eng. Stat. 8 & 9 Vict. c. 20, § 105. See also Story on Bailments, § 328; 2 Kent, Comm., 599; Hodges on Railways, 613; Angell on Carriers, § 125.

[12] 2 Greenleaf, Ev., 214; Leech *v.* Baldwin, 5 Watts, 446. Coxe *v.* Heisley, 19 Penn. St. 243, is where the owner represented the goods to be of much less value than they were, and thereby induced the carrier to exercise less watchfulness in regard to them. Relf *v.* Rapp, 3 Watts & S. 21, is a similar case, where a box of jewelry was put in an ordinary box and marked as glass, and the court held the misrepresentation such a fraud as to excuse the carrier from his common-law liability, even in the case of embezzlement by his servants.

But where goods are directed to be carried in a particular manner or position the carrier is bound to regard the direction, and he is liable for all damage resulting from his neglect to do so. Sager *v.* Portsmouth Railway, 31 Maine, 228.

As, where a box containing a bottle of oil of cloves was marked "Glass with care — this side up," — and was lost by disregarding the direction, it was held, this was a sufficient notice of the value and of the contents. Hastings *v.* Pepper, 11 Pick. 41; *post*, § 186.

[13] Miles *v.* Cattle, 6 Bing. 743.

[14] Davies *v.* Mann, 10 M. & W. 546; Robinson *v.* Cone, 22 Vt. 213, and cases referred to in the opinion of the court

contents. If accustomed to carry parcels, a carrier is bound to carry packed parcels (which is a bundle made up of smaller ones), according to the terms of the English statute.[15]

[15] Crouch *v.* The Great N. Railw., 9 Exch. 556; s. c. 25 Eng. L. & Eq. 449. By the 13 & 14 Vict. c. 61, § 14, it is provided that railway companies may make such charges as they may think fit, upon small parcels not exceeding 500 lbs. weight, provided that packed parcels forming an aggregate of more than 500 lbs. shall not come under this provision, but it shall apply only to single parcels in separate packages. Under this and similar English statutes it has been held, that if the packages are separate enclosures, although sent upon the same train and of the same kind enough to exceed the weight of 500 lbs., they may still be charged as parcels at any rate the companies may fix upon, which shall be uniform to all. Parker *v.* Great Western Railw., 6 E. & B. 77; s. c. 34 Eng. L. & Eq. 301. By the English Statutes, which limit the tonnage rates for railway transportation according to distance, and which are required to be uniform to all, the company may still charge something reasonable in addition, for loading and unloading the goods, when they perform that service. Parker *v.* G. W. Railw., *supra*. And in the same case it is held that the company may make a reasonable allowance to persons or companies for collection and delivery of goods at stations or to consignees, when that is part of their undertaking, without infringing the statute requiring uniformity of rates of charges. This subject is somewhat elaborately discussed by the Court of Exchequer, in Crouch *v.* The Great Northern Railw., 9 Exch. 556; s. c. 34 Eng. L. & Eq. 573, and the cases bearing upon the point, extensively referred to. The only point really decided there is, that it is a question of fact, whether one kind of goods or one kind of package is attended with more risk to the carrier than another. The question here was between packed parcels, the mass being addressed to one person, and the separate parcels intended for different persons, and "Enclosures" containing several parcels for the same person. The jury found there was no substantial difference in the risk. See also *post*, § 190, and Pickford *v.* Grand Junction Railw., 10 M. & W. 399; Parker *v.* Great Western Railw., 11 C. B. 545, and 8 Eng. L. & Eq. 426; Edwards *v.* Great Western Railw., 11 C. B. 588; 8 Eng. L. & Eq. 447. An opinion is here intimated (Crouch *v.* Great N. Railw.), that an express carrier, or collector and carrier of parcels, might recover special damage of a railway company who, by failure to perform their duty promptly, should injure his business. And Hadley *v.* Baxendale, 9 Exch. 341; s. c. 26 Eng. L. & Eq. 398, is cited in confirmation of the claim. But it was considered that the declaration did not cover the claim. The rule in regard to special damages is very correctly defined in Hadley *v.* Baxendale, so far as carriers are concerned. It is there held that, if the carrier is aware of the circumstances of the employer and the extent of the injury likely to occur by delay, and is still culpable, thereby causing such delay, he must make good the special damage. But if he is not aware of any unusual circumstances whereby special damages are likely to occur, he is only liable to such general damages as may be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. As, where a miller sent a shaft to be used as a model for casting a new one, and the carrier unreasonably delayed the delivery

5. Where goods differ, in some essential particulars, from the general character of advertised freight, and are usually subjected to a specific rate, the carrier will be entitled to so charge.[16]

of it, and consequently the return of the new one, and the plaintiff's mill, in the mean time, remained idle in consequence, none of these circumstances being known to the carrier, it was held the plaintiff could not recover special damage by reason of his mill remaining idle; and that it was the duty of the judge, in trying the case, to lay down a definite rule by which the jury shall estimate the damages, and to enable the judge to do so the full court should determine that rule. Blake *v.* Midland Railw., 18 Q. B. 93; 10 Eng. L. & Eq. 437; Alder *v.* Keighley, 15 M. & W. 117; *post*, § 189, n. 2.

In a recent and important case in the House of Lords, Finnie *v.* Glasgow & Southwestern Railw., 2 McQueen's H. of L. 177; s. c. 34 Eng. L. & Eq. 11, the subject of inequality of railway charges, for freight, is learnedly discussed by Lord Chancellor *Cranworth* and Lord *St. Leonards*, two of the most learned and experienced lawyers in England, and the surprising diversity of opinion between them upon a subject which, to common apprehension, seems not very difficult of solution, is another confirmation, if any were required, of the necessity of continued discussion in regard to the application of the most familiar principles of the law. In this case, the defendants leased a branch line upon which the plaintiff, a coal-owner, resided. The statute applicable to the subject provided, that the rates should be made equal to all persons in respect of goods passing over the same portion of, and over the same distance along, the railway, and under like circumstances; and that no reduction or advance should be made, partially, either directly or indirectly, in favor of or against any particular person. The rates of charge were higher upon the branch than upon the main line, for the same distance. When the plaintiff sent his coals along the branch, he was charged the branch rates; but when they reached the main line, then at the main-line rates. When coal-owners, living on the main line, sent their coals from the main line upon the branch, they were charged for the whole distance upon both lines, the main-line rates. Held [the two lords differing in opinion], that this was no violation of the equal rates clause in the statute. But it was held by Lord *St. Leonards* that it was a gross violation of such clause. It was doubted by the House, and by *Cranworth*, Lord Chancellor, whether, when one is overcharged in violation of this clause, the money can be recovered back by the party thus overcharged. But Lord *St. Leonards* was clearly of opinion it may be. If it were not for the doubt and the difference of opinion here, and the decision, one could entertain no serious question of the entire soundness of the opinions expressed by Lord *St. Leonards*.

A railway company cannot discriminate in their rates between goods carried partly by water and partly by railway and those carried exclusively by railway. Ransome *v.* Eastern Counties Railw., 1 C. B. (N. S.) 437; s. c. 4 id. 135. But it was said in this case, which is also reported in 38 Eng. L. & Eq., 232, that in determining whether a railway company has given undue preference to a

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[16] Lamar *v.* N. Y. & Savannah S. S. Co., 16 Ga. 558.

6. A railway company is bound to receive and carry freight in the order in which it is offered at the particular station, and not

particular person, the court may look at the fair interests of the company itself, and entertain such questions, as whether the company might not carry larger quantities, or for longer distances, at lower rates per ton, per mile, than smaller quantities, or for shorter distances, so as to derive equal profits to itself. This latter principle is reaffirmed in Ransome *v.* Eastern Counties Railw., 31 Law Times, 72, on appeal. And a railway company who advertised for carrying a certain description of goods, at a lower rate of charge, when sent through certain agents, were restrained by injunction from making any such discrimination. Baxendale *v.* The North Devon Railw., 3 C. B. (N. S.) 324. Nor can the railway companies, under the English statutes prohibiting undue preferences, so arrange their tariff in regard to certain commodities as to annihilate the effect of distance of transportation with dealers in those commodities in different localities. Ransome *v.* Eastern Counties Railw. Co., 4 C. B. (N. S.) 135.

And where the proprietor of coal mines was about to construct a railway for the accommodation of the lessees, and abandoned the purpose upon the public railway entering into an agreement to carry the coal from his pits at a reduced rate of charge from what others were required to pay from the same station for the same route, it was held to be an undue preference. Harris *v.* C. & W. Railw., 3 C. B. (N. S.) 693. But a railway company is justified in carrying goods at a less rate of charge for one person than that at which they carry the same description of goods for another, if there be circumstances which render the cost to the company less. Oxlade *v.* Northeastern Railw., 40 Eng. L. & Eq. 234; s. c. 1 C. B. (N. S.) 454. But a railway company cannot demand the statutory toll and something more for services performed, accommodation afforded, and expenses and risk incurred in and about the receiving, loading, and unloading, and delivering the goods, — that being a part of the consideration of the toll. Pegler *v.* Monmouthshire R. & Canal Co., 6 H. & N. 644. Nor can the company charge, in addition to the regular transport of the goods, for collecting or delivering the goods when such services were not performed; and such charges, if paid under protest, may be recovered of the company. Garton *v.* B. & E. Railw. Co., 1 El., B., & S. 112; s. c. 7 Jur. (N. S.) 1234. The subject of excessive charges for packed parcels is here presented and discussed in various forms, and the excess of legal charge held recoverable of the company. See also Baxendale *in re*, 11 C. B. (N. S.) 787; Baxendale *v.* West Midland Railw. Co., 8 Jur. (N. S.) 1072; s. c. 3 Giff. 650; Same *v.* Great Western Railw. Co., 14 C. B. (N. S.) 1. See 2 Jur. (N. S.) 1174; Same *in re*, 12 C. B. (N. S.) 758; Baxendale *v.* Great Western Railw. Co., in Exchequer Chamber, 10 Jur. (N. S.) 496; 16 C. B. (N. S.) 137.

But in a recent case (Baxendale *v.* Eastern Counties Railw., 4 C. B. (N. S) 63) it was held, that a railway company were not bound to carry parcels directed to different persons, but delivered to them at the same time, and all to be redelivered to the same person, at the place of destination, at the same rate as if directed to one person only. The plaintiffs were carriers who collect parcels from different persons to be forwarded by them through the railway, to be

with reference to all the stations on the road; and the rolling stock should be distributed to the several stations with reference

distributed, on their arrival, to the persons to whom directed. For these parcels, having such direction upon them, and no common mark, and not packed together, the company charged the same rate as for small parcels delivered by different persons, and not at the lower tonnage rates charged for heavy goods or parcels packed and directed to the same consignee; and it was held, that the charge was not unreasonable, inasmuch as the parcels, having nothing upon them to show that they were for the same consignees, might impose additional trouble upon the company. Although carriers are limited to a reasonable charge, there is no common-law obligation on a carrier to charge equal rates of carriage to all his customers. Ib. Nor does the statute apply where the carriage is from a point out of England to a point within, being partly by steamboats and partly by railway. Branly *v.* Southeastern Railw. Co., 12 C. B. (N. S.) 63; s. c. 9 Jur. (N. S.) 329.

Railway companies may discriminate by classes, in regard to freight or passengers, but their charges must be uniform to all persons; but they may, nevertheless, change their rates from time to time. Chicago, Burlington, & Quincy Railw. *v.* Parks, 18 Ill. 460.

But a company are not bound to issue season tickets at equal prices over equal distances upon their route. Jones *v.* Eastern Counties Railw. Co., 16 C. B. (N. S.) 718.

But where the company had been accustomed to unload goods transported by them, and place them upon the wagons of those carriers to whom they were consigned, without additional charge, but discontinued the practice as to all but Messrs. Pickford, to whom a comparatively small quantity came, the court considered that they could not, under Lord *Campbell's* act, require them to extend the same favor to other carriers, whose business was very much more extensive, that being more than the party was entitled to claim. But said, in giving judgment, that the plaintiff was not without just ground of complaint in regard to the greater facilities afforded other carriers, and if the plaintiff had urged this specific ground of complaint, both to the company and before the court, they would even have modified the written information to meet the justice of the demand, and might do the same thing upon the renewal of the complaint and refusal of the company to comply with it. Cooper *v.* London & Southwestern Railw., 4 C. B. (N. S.) 738.

By the construction of the English statute railways are limited to a reasonable charge, and to all parties at the same rate, in the transportation of parcels of less than one hundred pounds weight, and it was therefore considered that they could not make an increased charge in respect of packed parcels, if they were not subjected to any additional risk and expense on that account. Piddington *v.* Southeastern Railw. Co., 5 C. B. (N. S.) 111.

It is not competent for a railway company in England, under the English Railway Traffic Act, to carry for one person at a rate below their ordinary charge, because that person will, on that account, stipulate to employ them in other transportation wholly distinct and independent. And it is competent for the courts to enjoin any such preference, although it may be granted for an equivalent advan-

to the amount of business done at each.[17] The refusal of a common carrier to carry for a particular consignee, is a breach of duty towards the consignor, and he should bring the action.[18]

tage by the company. Baxendale *v.* Great Western Railw., 5 C. B. (N. S.) 309; Id. 336.

This question is discussed very much at length in the two last cases, occupying a large space in the reports. The complainants had derived their profits altogether from the charge for collecting the goods to be carried on the railway, and the company raised their price so as to embrace the charge for collecting, and gave notice that they would bring the goods to their stations without charge, thereby creating a monopoly of that portion of the business, which the court regarded as giving themselves an undue preference in regard to it.

But in Nicholson *v.* Great Western Railw., id. 366, it was decided that it was competent to a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear that in entering into such agreements the company have only the interests of the proprietors and the legitimate increase of the profits of the company in view, and that the consideration given to the company in return for the advantages afforded by them is adequate, and the company are willing to afford the same facilities to all others upon the same terms. And this may consist in a guaranty of large quantities and full train loads, at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guaranty. The company have no right, as already stated, to impose upon a customer a charge for conveying goods to and from their station if he does not require such service to be performed by them. Garton *v.* Bristol & Exeter Railw., 6 C. B. (N. S.) 639. And it is an undue preference to allow one carrier to the railway to unload his goods regularly at a later hour in the day than the station is open to other carriers, or to fix a uniform rate for the transportation of different classes of freight below the average of the customer's business, it not appearing that this diminished charge was justified by any special circumstances of advantage to the company, independent of special favor to this party. Ib.

The omission by a railway company of a public duty, as not keeping the water of such depth about their dock as to allow the approach of ships, although done to gain a business advantage over ship transportation, is not a matter to be redressed by injunction under the Railway Traffic Act, it being subject to redress by mandamus or indictment. Bennett *v.* Manchester, Sheffield, & Lincoln, Railw., 6 C. B. (N. S.) 755.

The doctrine of the case of Nicholson *v.* Great Western Railw., *supra*, is reaffirmed in 7 C. B. (N. S.) 707.

[17] Ballentine *v.* Western Mo. Railw., 40 Mo. 491.

[18] Lafarge *v.* Harris, 13 La. Ann. 553.

SECTION XI.

Notice or Express Contract restricting Carriers' Responsibility.

1. *Special contract, limiting responsibility, valid.*
2. *Notice, assented to by consignor, has same effect.*
3. *But as matter of evidence, it is received with caution.*
4. *Carrier must show that consignor acquiesced in notice.*
5. *Decided cases. Carriers' Act.*
6. *New York courts held, at one time, that express contract will not excuse the carrier.*
7. *American cases generally hold notice, assented to, binding.*
8. *But in New Hampshire, knowledge of such notice is not sufficient to bind the owner.*
9. *Will not excuse for negligence.*
10. *Cases in Pennsylvania.*
11. *General result of all the cases.*
12. *The rule under the English statute stated and illustrated.*
13. *Different modes in which the carrier may waive his own notices.*
14. *Notice of one kind will not excuse from responsibility of another.*

§ 177. 1. The effect of special or general notices in restricting the general liability of carriers, is one of vast importance, and has created a great deal of discussion. We should scarcely be expected to go into the full detail of the whole subject, but we shall state the points established by the better-considered cases upon the subject. It was never made a serious question, in the English law, since the case of Southcote, 4 Co. 83, that any bailee might stipulate for an increased or a diminished degree of responsibility from that which the law imposed upon his general undertaking.

2. And, upon principle, it is difficult to distinguish between an express contract, exonerating the carrier from his ordinary responsibility, and a notice from the carrier that he would not assume such responsibility, brought home and assented to by the owner of goods delivered to be carried. For as the carrier may refuse to carry, and thus subject himself to an action for damages, he may equally, it would seem, undertake to carry upon such terms as his employers are willing to negotiate for, so that, upon principle, a notice brought home to the owner of the goods and assented to, is neither more nor less than a special contract.

3. But a notice, brought home to the owner of the goods as evidence, merits a very different consideration, in this species of bailment, from any other, where there is no obligation upon the bailee to assume the duty. In the case of a carrier, with whom it is not optional altogether whether to carry goods offered or not,

but where he must carry such goods as he is accustomed to carry, upon the general terms of liability imposed by the law, or submit to an action for damages, and where every one, desiring goods carried, has the option to have them carried without restriction of the carrier's duty, unless he choose to waive some portion of his legal rights, for present convenience or ultimate peace; the mere fact of such a notice, restricting the carrier's liability, being brought home to the knowledge of the owner of goods, before or at the time of depositing them with the carrier, is no certain ground of inferring whether the carrier consented to recede from his notice and perform the duty which the law imposes upon him, or the owner of the goods consented to waive some portion of his legal rights.

4. Perhaps, upon general grounds of inference, it might be regarded as more logical and more reasonable to infer, that the carrier receded from an illegal pretension, than the owner of the goods from a legal one. At all events, to exonerate the carrier from his general liability, he must show, at the least, it would seem, that the owner assented to the demands of the notice, or acquiesced in it, by making no remonstrance.

5. It will be found that the decided cases mainly coincide with these general propositions.[1] The English statute, the Carriers'

[1] Nicholson *v.* Willan, 5 East, 507, is one of the earliest cases, where the mere fact of notice is treated as equivalent to an express contract, and this is upon the presumption that it was assented to by the owner of the goods, who seems to have been present at the time the goods were deposited, and to have been made aware of the notice. Nothing is said of any remonstrance upon his part. This notice, it will be observed, is only that packages above the value of £5 must be disclosed and insured as such. This notice seems nothing more than a regulation of their business, to enable them to know the value of their parcels, and to demand pay accordingly, which all carriers may now do, by statute in England, and in this country by general usage. See also Reynold *v.* Waterhouse, 1 M. & S. 225; Catley *v.* Wintringham, Peake, 150; Cobden *v.* Bolton, 2 Camp. 108.

In Riley *v.* Horne, 5 Bing. 217, Ch. J. *Best* shows, very conclusively, the reasonableness and justice of allowing carriers to require, by general notices, of those who bring goods or parcels, to disclose the contents, and to demand pay in proportion to their value, by way of insurance. Wyld *v.* Pickford, 8 M. & W. 443, seems to decide the same. And it seems especially reasonable that where the owner of the goods, being aware of the notice of the carrier that he will charge a higher price for valuable goods, does not disclose the value, in order to save expense, he should have no claim for any loss without the fault of the carrier. Clay *v.* Willan, 1 H. Bl. 298; Izett *v.* Mountain, 4 East, 370. See also Gordon *v.* Ward, 16 Mich. 360.

Act,[2] requires the owner of goods of great value, in small compass, enumerated in the act, which is very extensive, to declare to the carrier, at the time of delivery, the contents of the parcels, and pay the requisite price, or the carrier is exonerated from liability.

6. In the State of New York the courts at one time held, that it is not competent for carriers to exonerate themselves from their general liability, either by notices brought home to the owner of goods, at the time they are deposited for carriage, or by express contracts to that effect even.[3]

[2] 11 George IV. & 1 Will. IV. ch. 68.

[3] Cole *v.* Goodwin, 19 Wend. 251; Hollister *v.* Nowlen, 19 Wend. 234; Gould *v.* Hill, 2 Hill, 623. But see also Fish *v.* Chapman, 2 Kelly, 349; Jones *v.* Voorhees, 10 Ohio, 145; Dorr *v.* The N. J. Steam Nav. Co., 1 Kernan, 491. The New York courts seem to have adhered to the case of Hollister *v.* Nowlen. Cam. & Am. Railw. *v.* Belknap, 21 Wend. 354; Clark *v.* Faxton, id. 153; Alexander *v.* Greene, 2 Hill, 9; 7 id. 533; Powell *v.* Myers, 26 Wend. 594. But the case of Gould *v.* Hill, in which it was held that the carrier could not exonerate himself from his common-law responsibility, by a special contract, has been deliberately disregarded in two cases: Parsons *v.* Monteith, 13 Barb. 353; Moore *v.* Evans, 14 Barb. 524. And in Morris *v.* Bay State, &c., 4 Bosw. 225, it was held that if the carrier may limit the extent of his responsibility by express contract, he cannot by mere notice. In the Western Transportation Co. *v.* New Hall, 24 Ill. 466, it was held, that carriers cannot restrict their common-law responsibility by notice brought home to the owner of the goods, unless the same is assented to in express terms by such owner; and when any risks are excepted in the bill of lading, it is incumbent upon the carrier to prove that the loss resulted from such risks. So also in Edwards *v.* Cahawba, 14 La. Ann. 224; Falvay *v.* Northern Transportation Co., 15 Wis. 129.

And in Dorr *v.* N. J. Steam Nav. Co., 1 Kernan, 487, 491, in the Court of Appeals, *Parker*, J., says: "I am not aware that Gould *v.* Hill has been followed in any reported case."

In Wells *v.* Steam Nav. Co., 2 Comst. 209, *Bronson*, J., who seems to have concurred in the decision of Gould *v.* Hill, says: "It is a doubtful question;" and *Parker*, J., in Dorr *v.* N. J. Steam Nav. Co., *supra*, says: "That a carrier may, by express contract, restrict his common-law liability, is now, I think, a well-established rule of law. It is so understood in England: Aleyn, 93; 1 Ventris, 190, 238; Peake's N. P. C. 150; 4 Burrow, 2301; 1 Starkie, 186; 8 M. & W. 443; 4 Co. 84; and in Pennsylvania, 16 Penn. St. 67; 5 Rawle, 179; 6 Watts & S. 495. In other States where the question has arisen, whether notice would excuse the liability of the carrier, it seems to have been taken for granted that a special acceptance would do so; and in N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 382, it was so held by the Supreme Court of the United States."

The Superior Court of the city of New York has adopted a similar view, in the same case. 4 Sandf. 136; and in Stoddard *v.* Long Isl. Railw. 5 Sandf. 180.

7. But most of the American cases admit that carriers may restrict their general liability, by notices brought home to the

The following cases may also be here referred to as holding the general doctrine upon this subject: Swindler *v.* Hilliard, 2 Rich. 286; Camden & Amb. Railw. *v.* Baldauf, 16 Penn. St. 67; Reno *v.* Hogan, 12 B. Monr. 63; Farm. & Mech. Bank *v.* The Champlain Transp. Co., 23 Vt. 186; Barney *v.* Prentiss, 4 Har. & Johns. 317.

As the result of all the cases upon the subject, and of true policy and sound principle, it must be admitted that a carrier may relieve himself from his duty to insure the safe arrival of the goods at their destination, by a special contract to that effect, or what is equivalent, that a special notice to that effect, brought home to the mind of the owner of the goods, at the time of delivery, or before, and no objection made to it, will have the force of a special contract, according to the English cases, but that, according to many of the American cases, some further evidence of assent on the part of the owner is requisite. Opinion of *Isham*, J., in Kimball *v.* Rut. & Bur. Railw., 26 Vt. 247. If a different rate of charge is made, the election of the lower rate is an assent to the notice.

The language of *Nelson*, J., in New Jersey Steam Nav. Co. *v.* The Merchants' Bank, 6 How. (U. S.) 344, is perhaps a fair exposition of the American law upon the subject: "He (the carrier) is in a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself, without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court, in Hollister *v.* Nowlen, that if any implication is to be indulged, from the delivery of the goods under the general notice, it is as strong, that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation, by parol or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

To the same effect is the opinion of the court in Farmers' & M. Bank *v.* The Champlain Transp. Co., 23 Vt. 186, 205. "We are more inclined to adopt the view, which the American cases have taken of the subject of notices by common carriers, intended to qualify their responsibility, than that of the English courts, which they have, in some instances, subsequently regretted. The consideration that carriers are bound, at all events, to carry such parcels, within the general scope of their business, as are offered to them to carry, will make an essential difference between the effect of notices by them, and by others who have an option in regard to work which they undertake. In the former case, the contractor, having no right to exact unreasonable terms, his giving public notice that he shall do so, where those who contract with him are not altogether at his mercy, does not raise the same presumption of acquiescence in his demands,

knowledge of the owner of the goods, before or at the time of delivery to the carrier, if assented to by the owner, which is but another form of defining an express contract, which seems to be everywhere recognized as binding upon those contracting with carriers, unless New York may form an exception.[4]

8. But it was held that the owner of goods delivered at the station-house of the railway, to be carried from Dover to Boston, and which were consumed by an accidental fire, at the former place, was not precluded from recovery of the value of the goods by a general notice of the company, known to the plaintiff at the time of the delivery of his goods, that all goods would be at the risk of the owners while in the defendants' warehouse.[5]

9. And in another case it was held, that a paper exonerating the company from all liability to the plaintiff for damage, which might happen to any horses, oxen, or other animals he might send by their railway, did not exonerate them from liability for negligence.[6]

10. In Pennsylvania, the rule of the English law, that a carrier

as arises in those cases where the contractor has the absolute right to impose his own conditions. And unless it be made clearly to appear that persons contracting with common carriers expressly consent to be bound by the terms of such notices, it does not appear to us that such acquiescence ought to be inferred."

And a notice restricting the carrier's liability for baggage, "printed on the back of the passage-ticket, and detached from what ordinarily contains all that it is material for the passenger to know, does not raise a legal presumption that the party had knowledge of the notice before the train left. That is a question for the jury." Brown *v.* Eastern Railw. Co., 11 Cush. 97. In a late case (State and Burgess *v.* Townsend, 37 Alab. 247), it was decided that a common carrier cannot limit his common-law liability by any general notice, but may do so by special contract with the shipper. And a bill of lading, given by the carrier on receipt of the goods, and accepted by the shipper, is a special contract within the meaning of the rule. But such special contract cannot be considered as exempting the carrier from responsibility for any loss occurring from his own negligence. But when the bill of lading exempted the company from all responsibility, except for wilful negligence or fraud, on account of the freight being reduced, it was held a valid contract. Lee *v.* Marsh, 43 Barb. 102. Common carrier cannot stipulate for exemption from responsibility for negligence, either of himself or his servants. Ashmore *v.* Penn. Steam Towing and Transp. Co., 4 Dutcher, 180.

[4] N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; Sager *v.* The P. S. & P. Railw. Co., 31 Maine, 228; Bean *v.* Green, 3 Fairfield, 422; Cooper *v.* Berry, 21 Ga. 526.

[5] Moses *v.* Boston & Maine Railw., 4 Foster, 71; *ante*, § 174, n. 11.

[6] Sager *v.* P. S. & P. Railw., 31 Maine, 228.

may restrict his liability, by a special acceptance, seems to be firmly established, notwithstanding some misgivings expressed by the courts in regard to the good policy of such a rule. The more prominent cases upon the subject are referred to in the opinion of the court, in Dorr *v.* N. J. Steam Nav. Co.[7] The onus of proving any qualification of the common-law responsibility of the carrier rests upon him. The notice to be of any force must amount to actual notice. And where the general object of a check or ticket is emblazoned in large letters, and the restriction printed in small ones, it will not be regarded as of much force as evidence of notice. But where the notice is shown to have been acquiesced in, the effect is only to render the carrier responsible bailees or private carriers for hire.[8]

11. It would seem then to be the result of the decisions everywhere, that carriers may limit their common-law responsibility as insurers, by special contract at the time of acceptance, and that a notice to that effect, brought home to the knowledge of the owner of the goods at the time, or before the delivery of the goods, and assented to by him, or against which he makes no remonstrance or objection perhaps, will have the same effect in general with such exceptions, limitations, and qualifications as reason and justice may require, to be judged of by the court and jury, with reference to the circumstances of each particular case.[9]

[7] 1 Kernan, 485, 491; Atwood *v.* The Reliance Co., 9 Watts, 87; Bingham *v.* Rogers, 6 Watts & Serg. 495; Laing *v.* Colder, 8 Penn. St. 479.

[8] Verner *v.* Sweitzer, 32 Penn. St. 208. And where the shipper assumes the exclusive charge of goods during the voyage, to excuse the carrier, it must appear that the damage occurred from the fault of the shipper. Roberts *v.* Riley, 15 La. Ann. 103.

[9] The English statute, 17 & 18 Vict. c. 31, § 7, defines the effect of these notices of carriers in England, which is considered more at length under § 185. The latest English case upon this point, Simons *v.* Great Western Railw., 2 C. B. (N. S.) 620, holds, that a notice, signed by a person who cannot read, and who is told by the clerk of the company that it is mere form, is not binding as a contract. Cooper *v.* Berry, 21 Ga. 526. Whether the consignor of goods, or the person depositing them with the carrier, has authority to contract, on the part of the consignee, being the owner, or party interested in the transportation, for exemption of the carrier from his ordinary responsibility, is, in each particular case, a question of fact, depending upon the special circumstances, and must be determined by the jury according to what is reasonable and just, between the consignee and the carrier. Am. Transportation Co. *v.* Moore, 7 Law Reg. 352.

The questions commonly arising, in trials where the carrier claims exemption

12. The English statute[10] in regard to carriers claiming exemption from their common-law responsibility, by reason of special notice or contract, requires that it be embodied in a special contract in writing between the company and the owner, or person delivering the goods to the company, that the contract be signed by such owner or person, and that the court or judge shall determine it to be just and reasonable. Under this statute the House of Lords have held, in a somewhat recent case, where the agent of the owner of marble chimney-pieces forwarded them to the company for transportation, and received at the same time notice, that if the company forwarded them as common carriers, it must be done under an insurance and a reasonable premium paid therefor; and where, after considerable discussion between the agent of the owner and the company, as to the rate of premium to be paid for insurance, he finally gave directions in writing to have the goods forwarded "uninsured," which was accordingly done, and the goods were injured on the journey, that the transaction did not come within the requirements of the statute, not being embodied in any written contract properly signed by the owner or his agent; but that if such had been the fact, the "conditions would have been neither just nor reasonable." Lord *Chelmsford*, with his usual common-sense sagacity and natural instinct in favor of practical convenience, seems to have entertained a different view in regard to the reasonableness and justice of the company requiring an additional premium for insuring the safety of marble chimney-pieces, above what would have been demandable in the case of blocks of marble, or other commodities not specially fragile.[11]

from his ordinary responsibility, in consequence of special contract, or notice, are here discussed, by *Campbell*, J., with a good deal of thoroughness and ability. And the opinion upon another point, the just construction of the act of Congress, exempting the owners of ships from liability for losses by fire, except where the vessel is "used in rivers or inland navigation," is surprisingly elaborate and thorough. The conclusion arrived at, that the navigation of the great American lakes and their connecting waters does not come within the exception, is probably in accordance with the recently established opinions, as to the extent of the admiralty jurisdiction in this country, although not perhaps entirely consonant with the earlier, or the popular opinions upon the subject. In regard to the last point the court were divided.

[10] Railway and Canal Traffic Act of 1854, § 7, 17 & 18 Vict. c. 31.

[11] Peek *v.* North Staffordshire Railw. Co., El., Bl., & El. 958; s. c. 6 Jur. (N. S.) 370; s. c. 6 W. R. 997, K. B.; s. c. 8 W. R. 364, Exch. Chamber.

13. In regard to the carrier waiving his notice, it has been held not to amount to that, because he had before settled for damages to goods, with the same party, without inquiring into the cause of such damages.[12] And a railway company who had given notice that they would not be responsible for the luggage of passengers, unless booked and paid for according to their rate of charging the excess above a certain weight, were held responsible for luggage delivered to one of their servants, and not booked and paid for, in the absence of evidence that the company had provided the means of booking.[13] And if the owner declare the nature of the goods, he is not bound to tender the additional charge required by the statutes or rules of the company, until demanded.[14] If a carrier give two notices, he is bound by the one least for his advantage.[15]

14. A ticket delivered at the time of receiving live stock for transportation on a railway, that the carrier will not be responsible for any injury, while travelling, loading, or unloading, will not excuse him from responsibility in not providing a sufficient carriage.[16]

SECTION XII.

Notice, or Express Contract, limiting Carriers' Liability.

1. *Written notice will not affect one who cannot read.*
2. *Carrier must see to it that his notice is made effectual.*
3. *Must be shown that knowledge of notice came to consignor.*
4. *But former dealings with same party may be presumptive evidence.*
5. *Carrier cannot stipulate for exemption from liability for negligence.*
6. *But carrier may be allowed to stipulate for exemption from responsibility as an insurer.*

7–12. *Review of the cases favoring this proposition.*

13, 14, *and n.* 22. *Review of English cases bearing in opposite direction.*

15. *The United States Supreme Court hold to the rule we contend for.*
16. *The responsibility of ship-owners under the act of Congress.*

§ 178. 1. The courts have from time to time been accustomed to ingraft such exceptions, in regard to the effect of carriers' notices, as seemed necessary to render their operation reasonable and just.

[12] Evans *v.* Soule, 2 M. & S. 1.

[13] Great Western Railw. *v.* Goodman, 12 C. B. 313.

[14] Great Northern Railw. *v.* Behrans, 7 H. & N. 950. See also Wilson *v.* Freeman, 3 Camp. 527.

[15] Mann *v.* Baker, 2 Starkie, 255.

[16] Shaw *v.* York & North Midland Railw., 13 Q. B. 347.

It was held that such notice could have no effect, by being posted upon the office of the carrier, if the owner of the goods or the party who delivers them at the office cannot read.[1]

2. In another case, where the party delivering the goods could read, and had seen the carrier's notice upon a board hanging in the office, but, *not supposing* it interested him, had, in fact, never read it, it was held he was not affected by it. Lord *Ellenborough* said at the trial, "You cannot make this notice to this *non-supposing* person." The hardship of the case cannot alter the liability of the party." The rule is here laid down by this learned and sensible judge, that the carrier must see to it that he adopts such a medium of notice that the party with whom he deals shall be "effectually apprised of the terms upon which he proposes to deal."[2]

3. And it was held the notice was insufficient if the advantages of the mode of carriage were stated in large letters and the conditions and exemptions in small letters.[3] So, too, if the printed notice be in a place where the party would not ordinarily see it, in the mode in which he came to the office, it could have no effect upon the liability of the carrier.[4] So, too, where the goods were delivered at a station where no notice was put up, although notices were put up at each terminus of the route.[5] All this shows very clearly that such notices, by printed cards or inserted in news-

[1] Davis *v.* Willan, 2 Starkie's Cases, 279. *Abbott*, J., here says, a notice, to have effect, must be brought "plainly and clearly to the mind of the party who deals with them." — "It may happen that the party cannot read, and if it so happen, it is the misfortune of the carrier, or his fault, that he does not communicate his intention by some other means."

[2] Kerr *v.* Willan, 2 Starkie, 53. When the case came before the full bench, on motion for new trial, the court said, in regard to the duty to make the notice effectual, "If the agent could not read, he might be able to hear, or, at all events, a handbill might be delivered to him, to be taken to his principal." The rule of law might be superseded by special contract, but it must be proved, and whether it exists or not is always a question for the jury.

[3] Butler *v.* Heane, 2 Campb. 415.

[4] Walker *v.* Jackson, 10 M. & W. 161; Gouger *v.* Jolly, 1 Holt, N. P. C. 317.

[5] 1 Holt, N. P. C. 317. *Gibbs*, Ch. J., says, "the carrier is liable, unless express notice is brought home to the plaintiff." This is the ground assumed in all the cases. Beekman *v.* Shouse, 5 Rawle, 179; Bean *v.* Green, 3 Fairfield, 422; Story on Bailments, § 558; Brooke *v.* Pickwick, 4 Bing. 218. *Best*, Ch. J. here lays down the rule, in regard to notices, that it is not enough to post them up in a conspicuous place in the office of the carrier. But they must be at the pains *to make the customer understand* the restrictions which they propose to claim upon

papers, are not sufficient, unless it be shown that knowledge of the contents of such notices came to the party, and this is always a question for the jury.[6] And there should be positive evidence of assent to the condition contained in the notice, it is said, in some cases, and this question of assent is to be determined by the jury upon the evidence *aliunde*, and not upon the terms of the receipt merely.[7] But where the carrier regularly issued his hand-bills every month, which contained a notice that he would only receive goods upon the condition that he was not to be liable for inward condition, leakage, and breakage, and that he should not be responsible for any loss or damage to the goods during the voyage; and it was conceded that the plaintiff had received such circular regularly; it was held he could not recover of the carrier for the loss of a cask of brandy which he had given the carrier for transportation, and which had got staved during the voyage. The court regarded the circular as forming the basis of the contract between the parties.[8]

4. But the carrier may give evidence of the manner of transacting similar previous business between him and the plaintiff as presumptive evidence of notice, and an implied special acceptance in this particular case.[9]

their responsibility. This we think the only safe rule, in regard to notices by carriers. And unless this be clearly shown, the leaving the goods, without objection, seems to be no ground whatever of presuming against the owner. And even with this, it is still a question for the jury, whether he expected to be bound by it, or, in other words, whether he supposed, at the time, that the carrier so understood the matter. *Ante*, §§ 177, 178.

[6] Clayton *v.* Hunt, 3 Campb. 27; Rowley *v.* Horne, 3 Bing. 2. In this case the defendant proved that the plaintiff had regularly taken a weekly newspaper, in which his advertisements were constantly inserted, for over three years. The jury having found a verdict for plaintiff for the full loss sustained, the full bench refused a new trial. They said it could not be intended a party read all the contents of any newspaper he might take. The carrier should fix upon the party a knowledge of the notice, and this he might easily do, by delivering to each one who brought a parcel a printed copy of such notice.

[7] Michigan Central Railw. *v.* Hale, 6 Mich. 243.

[8] Phillips *v.* Edwards, 3 H. & N. 813.

[9] Roskell *v.* Waterhouse, 2 Starkie, 461. In this case the evidence was that the plaintiff had sent similar parcels by defendant, which had been lost, and no action brought for the loss. Mayhew *v.* Eames, 3 B. & C. 601. In this case the principals had previous parcels sent by the same carriers, and had received at such times their printed notices, and the court held that sufficient notice to them, in this case, notwithstanding their agent, in this particular case, delivered the

5. But notwithstanding such notice, that parcels are to be at the risk of the owner, and this assented to by the owner, the cases chiefly agree that the carrier is still liable for gross neglect,[10] and many of the earlier and best considered English cases regard such notices as having no reference whatever to the ordinary risks of transportation, but as only intended to relieve the carrier from those extraordinary responsibilities which the common law had imposed upon this class of bailees. And it cannot be denied that this view of the subject has very much to commend it to our favorable consideration. There is certainly something very incongruous, and not a little revolting to the moral sense, that a bailee for hire should be allowed to stipulate for exemption from the consequences of his own negligence, ordinary or extraordinary. A laborer, domestic, or mechanic, who should propose such a stipulation, would be regarded as altogether unworthy of confidence in any respect, and the employer, who should submit to such a condition, must be reduced to extreme necessity, one would suppose. We could scarcely believe that any competent tribunal would for a moment entertain such a proposition, if we did not know that the ablest courts in Westminster Hall had done so. This question is considerably discussed in some of the late cases in the English courts under the Railway and Canal Traffic Act.[11] In the Court

parcel to the carriers, without any knowledge that they had given notice that they would not be responsible for bank-notes, unless entered and paid for accordingly. The court say the principals should have apprised their agents of this notice, and not to send by them without insuring.

Notice to the principals in another transaction is good in this, but not so of notice to the agents. Notice to the agents, in order to bind the principals, must be in the same transaction. The principal and agent, so far as the same transaction is concerned, are to be regarded for purposes of notice, as identical. Fitzsimmons *v.* Joslin, 21 Vt. 140, 141, 142, opinion of the court.

[10] *Post*, pl. 7–16, and cases cited. See also Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. 205, opinion of the court upon this point, and cases cited. Powell *v.* Penn. Railw. Co., 32 Penn. St. 414; Illinois Central Railw. *v.* Morrison, 19 Illinois, 136. Where the plaintiff contracted to have cattle carried on defendants' train at a lower rate than the usual charge, and stipulated to assume the risk of transportation, and accompanied and had them in charge during the transportation, it was held that there had been no complete delivery to the company, and that they were only liable for gross or wilful misconduct. Ib. And the same rule was adopted in Goldey *v.* Pennsylvania Railway, 3 Penn. St. 242.

[11] 17 & 18 Vict., ch. 31, § 7.

of Exchequer[12] it was decided, on solemn argument, that a notice of the company, assented to by the consignee, and which by consequence became a contract, that in regard to live stock they would not be liable for any injury or damage howsoever caused, was a reasonable contract, and excused the company for a loss, occurring from a defect in the box in which a horse was carried, this defect not being known to the servant who put it to the use where the damage occurred. But in the same case in the Exchequer Chamber,[13] upon great consideration, it was held that such a contract was unreasonable, within the statute requiring the court to determine the question of the reasonableness of contracts by carriers for exemption from responsibility; and that it was therefore void under the statute, and that it did not protect the company from liability in respect of the defect in the truck.

6. But that a carrier by steamboat or railway, or indeed, in any other mode, should be allowed to stipulate for exemption from insurance of the goods, or else demand a premium and specification, as in other cases of insurance, seems highly just and reasonable.[10]

7. In Duff *v.* Budd,[14] the carrier was held liable for delivering a box to a wrong person, notwithstanding a notice that he would not be liable for parcels of that description, the judge directing the jury that the carriers' negligence had been such as to render it unnecessary to consider the question of the notice, and the full bench, on argument, refused a new trial.

8. And in Garnet *v.* Willan,[15] where the carrier delivered the parcel to another line of carriers, and it was lost before it reached its destination, it was held, notwithstanding a similar notice, the first carrier was liable. In both these cases the carrier was held liable as for gross negligence. And Beck *v.* Evans[16] was decided upon the same ground, and involves the very same point.

[12] McManus *v.* Lancashire Railw., 2 H. & N. 693.

[13] 4 H. & N. 327. It is here said the statute is to be construed with reference to the state of the law relating to carriers at the time it was passed.

[14] 3 Brod. & Bing. 177.

[15] 5 Barn. & Ald. 53. And in such case the jury having found that the risk was increased by the change of carriers, the first carrier is liable, even where he was *deceived* as to the value of the parcel. Sleat *v.* Fagg, 5 B. & Ald. 342; *post*, pl. 10, n. 19.

[16] 16 East, 244. Smith *v.* Horne, 8 Taunt. 144, is to the same effect. So also is Reno *v.* Hogan, 12 B. Monroe, 63.

Cha. B. Lord.

9. In Bodenham *v.* Bennett,[17] it was held that such notices are only intended to exempt carriers from extraordinary events, and in the language of Baron *Wood*, " were not meant to exempt from due and ordinary care."

10. In Batson *v.* Donovan,[18] *Best*, J., said, " The only effect of the notice is that employers are informed that carriers will not be insurers of goods above a certain value, unless paid a reasonable premium of insurance." And the learned judge insists with great earnestness that the carrier and his servants must, in cases of this kind, notwithstanding the notice, assented to by the owner of the goods, " take the same care of them that a prudent man would take of his own property," which seems just and reasonable. But the majority of the court held in this case (*Best*, J., *dissentiente*), that the plaintiff, by delivering a box containing bills, checks, and notes, to the value of £4,072, without intimating that the contents were valuable, when he knew that the carrier expected a premium for insurance in such cases, was guilty of such fraud and deception as to preclude a recovery, except for such gross neglect as would be reprehensible if the parcel had been of less value than £5, the limit named in the carrier's notice. And we see no reason to question the soundness of the grounds upon which the case is put,[19] and it seems to us entirely consistent with the general views assumed by *Best*, J.

[17] 4 Price, 31. Birkett *v.* Willan, 2 B. & Ald. 356, is decided upon the authority of Bodenham *v.* Bennett, and holds that such notice, assented to by the owner of the goods, will not excuse the carrier for gross negligence.

[18] 4 Barn. & Ald. 21.

[19] See *post*, § 185, and cases cited.

Some of the early cases do not seem to regard a deception in reference to the contents of a parcel delivered to a carrier, as excusing the carrier from his common-law liability of insurer, there being no notice from the carrier in regard to being informed of the contents of valuable parcels. Kenrig *v.* Eggleston, Aleyn, 93. So in the case from 1 Ventris, 238, cited by Lord *Mansfield*, in Gibbon *v.* Paynton, 4 Burrow, 2298. But his lordship, who saw through all disguises, dissents emphatically from any such rule of responsibility, and indorses the case of Tyly *v.* Morrice, Carthew, 485, as " being determined on the *true* principle that the carrier was liable *only* for what he was *fairly told of*."

In this last case two bags were delivered to the carrier sealed up, said to contain £200, and receipted accordingly, with a promise to deliver to T. Davis, he to pay 10*s*. per cent for carriage and *risk*. The carrier was robbed, and the chief justice was of opinion the plaintiff should only recover for £200, the undertaking being for £200, and the reward only for that sum. And "since the plaintiff had taken this course to *defraud the carrier of his reward*, he had thereby

11. The general rule of law upon this point is well stated by Baron *Parke*.[20] "The weight of authority seems to be in favor of the doctrine, that in order to render the carrier liable, after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence, gross negligence in the sense in which it has been understood in the last-mentioned cases [Batson *v.* Donovan, and Duff *v.* Budd]. And the effect of such notice is, that the carrier will not be responsible, at all events, unless he is paid a premium, — but still he undertakes to carry, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage. And after such notice it may be that the burden of proof of damage or loss by want of such care would lie upon the plaintiff."

12. This seems to be placing the effect of such notices upon a reasonable basis, and most of the American cases will be found to have adopted, in the main, similar views. The United States Supreme Court, in a case[21] of great importance, assume this

barred himself of that remedy which is *founded only on the reward*." And we do not see why this old rule, from Carthew, adopted by Lord *Mansfield*, in his opinion in this case (Gibbon *v.* Paynton), does not contain the essence of the law upon this point at the present time.

The case of Gibbon *v.* Paynton was that of £100 in gold, put in an old nail-bag, and that filled with hay to give it a mean appearance, and no intimation given to the carrier of its value; the bag and hay arrived safe, but the money was gone. The jury found a verdict for defendant, and the court unanimously denied a new trial.

[20] Wyld *v.* Pickford, 8 M. & W. 443; Hall *v.* Cheney, 36 N. H. 26.

[21] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. U. S. 344. This was a case as before stated where an express carrier, by special contract with the company, was allowed to carry a certain crate upon their boats, under the care and oversight of the expressman, with the express stipulation that all persons delivering parcels, to be carried by express, should be furnished with the following notice, annexed to the receipt or bill of lading executed for the goods; and that it should also be annexed to his advertisements, published in the public prints, or elsewhere: "Take notice, William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care, nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it, or its contents, at any time."

Mr. Harnden collected $20,000 in specie, in the city of New York, for the Merchants' Bank, Boston, and was transporting it to the bank, on board the Lexington, one of the company's boats, at the time it was burned in the

ground, in terms. The opinion of Mr. Justice *Nelson* is worthy of consideration upon this point.

Sound, through the gross mismanagement of the company's agent, and the specie lost.

Mr. Justice *Nelson*, in giving the opinion of the court, said, "The special agreement in this case under which the goods were shipped, provided, that they should be conveyed at the risk of Harnden, and that the respondents were not to be responsible to him, or to his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the sea-worthiness of the vessel, her proper equipment and furniture, or in her management by the master and hands. This is the utmost effect that was given to a general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (Story on Bailments, § 570); nor was it allowed to exempt him from accountability for losses occasioned by a defect in the vehicle or mode of conveyance used in the transportation. Although he was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and was therefore bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation. This rule, we think, should govern the construction of the agreement in question."

The same view is adopted in the following cases: Clark *v.* Faxton, 21 Wend. 153; Dorr *v.* N. J. Steam Nav. Co., 4 Sandf. 136; Parsons *v.* Monteath, 13 Barb. 353; Stoddard *v.* The Long Island Railw., 5 Sandf. 180; Fish *v.* Chapman, 2 Kelly, 349. Most of the American cases have maintained the principle, that a carrier cannot, by special notices, brought to the knowledge of the owner of the goods, or by contract even, exempt himself from the duty to exercise ordinary care and prudence in the transportation of freight and baggage. Sager *v.* Portsmouth, S. P., & E. Railw., 31 Maine, 228; Camden & Amboy Railw. *v.* Bauldauff, 16 Penn. St. 67; Laing *v.* Colder, 8 Penn. St. 479; Bingham *v.* Rogers, 6 Watts & Serg. 495, 500.

The case of Camden & Amboy Railw. *v.* Bauldauff, was that of a German, who could not read English. The railway advertised that they would carry fifty pounds baggage for each passenger, and that passengers are "expressly prohibited from taking any thing, as baggage, but their wearing apparel, which will be at the risk of the owner." The plaintiff had, in a trunk with his ordinary baggage, two thousand one hundred and one five-franc pieces. He paid for extra weight, and gave it in charge of the proper servant of the railway. The trunk was lost.

The court held the company liable on two grounds: 1. They have failed to

13. But some of the later English cases, before the late statute, the Railway and Canal Traffic Act of 1854,[22] had departed es-

show the manner of the loss, and the law presumes negligence, from the loss. 2. They have failed to show that the contents of their notice came to the knowledge of the plaintiff, which leaves them liable, as insurers, at common law.

In giving judgment, the court, *Rogers*, J., say, "They undertake to carry for hire, and by the very nature of their employment, to bestow, for the preservation of the goods, at least the ordinary care of a bailee for hire. From this duty, I have no hesitation in saying, they cannot discharge themselves, even by a special agreement with the owner. Such a stipulation would be void, being against the policy of the law. There is no principle in the law better settled than that, whatever has an obvious tendency to encourage guilty negligence, fraud, or crime, is contrary to public policy. Such, in the very nature of things, would be the consequence of allowing the common carrier to throw off the obligation which the law imposes upon him, of taking at least ordinary care of the baggage, or other goods, of a passenger. Under such a regulation, no man's property would be safe. Cole *v.* Goodwin, 19 Wend. 251; Atwood *v.* The Reliance Co., 9 Watts, 87."

And in The Penn. Railw. *v.* McCloskey, 23 Penn. St. 526, 532, the court say, in giving judgment: "Assuming that a public company of carriers may contract for other exemption from liability, than those allowed by law, still such a contract will not exempt from liability for gross negligence." And in Baker *v.* Brinson, 9 Rich. 201, it is decided, that where a carrier limits his liability, by special contract, the *onus* is upon him to show that the loss is within the exception, and that he was guilty of no negligence. See also, to same effect, Graham & Co. *v.* Davis, 4 Ohio (N. S.) 362. So also Baldwin *v.* Collins, 9 Rob. (Louis.) 478; Newstadt *v.* Adams, 5 Duer, 43.

[22] *Post*, §§ 178, 186, and notes.

In Austin *v.* The Manchester, S. & L. Railw., 10 C. B. 454; s. c. 11 Eng. L. & Eq. 506, the defendants let their trucks to the plaintiff, for the conveyance of certain horses by the defendants' engines along their railway, and delivered to the plaintiff a ticket, or notice, to the effect, "that the charge was for the use of the carriages and the locomotive power only, and that the plaintiffs were to see to the sufficiency of the carriages, before they allowed their horses or live stock to be placed therein, that the defendants would not be responsible for any alleged defects in their carriages, unless complaint was made at the time of booking, or before the same left the station, nor for any damages, however caused, to horses," &c. It was held that the plaintiff could not recover for damage done to his horses, in the transportation, through the breaking of an axle-tree, which was attributable to the culpable negligence of the company's servants.

Cresswell, J., in delivering judgment, said, "In the largest sense those words might exonerate the company for damage done wilfully, a sense in which it was not contended they were used in the contract; but giving them the most limited meaning, they must apply to all risks of whatever kind, and however arising, to be encountered in the course of the journey, one of which is undoubtedly the risk of a wheel taking fire, owing to neglect to grease it. Whether that is called

sentially from the basis, upon which the earlier cases, in regard to notices, in that country, rested.

negligence merely, or gross negligence, or culpable negligence, or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract."

It was held, too, in Chippendale *v.* The Lanc. & Yorkshire Railw., 7 Eng. L. & Eq. 395; s. c. 15 Jur. 1106, that in a case where the owner of cattle transported on defendants' railway, saw them put in the carriages, and signed a ticket, with this condition annexed, "The owner undertaking all risks of conveyance whatever," that there was no implied stipulation that the carriage should be fit for the conveyance of the cattle. And in Carr *v.* Same defendants, 7 Exch. 707; s. c. 14 Eng. L. & Eq. 340, upon a similar contract, where plaintiff's horse was injured, by the horse-box being propelled against some trucks, through the gross negligence of the company, it was held (*Platt*, B., *hesitante*), that the company were not responsible.

The grounds of the decision are stated very fully in the opinion of *Parke*, B.: "The jury have found that the defendants have been guilty of gross negligence and that must be taken as a fact. In my opinion the owner of the horse has taken upon himself the risk of conveyance, the railway company being bound merely to find carriages and propelling power; the terms of the contract appear to me to show this. The company say they will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description, travelling upon their railway. Thus, then, is a contract by virtue of which the plaintiff is to stand the risk of accident or injury, and certainly, when we look at the nature of the things conveyed, there is nothing unreasonable in the arrangement. In the case of Austin *v.* The Manchester, Sheffield, & Lincolnshire Railw. Company, 17 Q. B. 600; s. c. 5 Eng. L. & Eq. 329, the language of the contract was different from the present, but not to any great extent. [His lordship stated the case.] In that case, the accident was occasioned by the wheels not being properly greased; in the present case, the carriage that contained the plaintiff's horse was driven against another carriage. We ought not to fritter away the meaning of contracts merely for the purpose of making men careful. That is a matter that we are not bound to correct. The legislature may, if they please, put a stop to contracts of this kind, but we have nothing to do with them except to interpret them when they are made." But the opinion of Baron *Platt* seems to us far more consonant with reason and justice, and with the principle of the decided cases, both English and American. The learned Baron says, "The declaration states that the defendants were guilty of gross negligence, and that fact was proved. The *gravamen* of the charge is the gross negligence. [His Lordship read the notice.] Now, undoubtedly, since the establishment of railways, new subjects of conveyance have arisen. Formerly, horses were seldom carried, but now they are ordinarily conveyed by the trains. It is therefore said that new stipulations are necessary to guard carriers from the risks which are incidental to this new mode of conveyance. It is suggested that the animal may be alarmed by the noise of the engine, by the speed of the carriages, and by various other causes, and that, unless we take upon ourselves the office of legislation, this ticket absolves the carriers from all responsibility. I own I am startled

14. We have arranged these cases in a note[22] at the end of this section, as a remarkable illustration of the tendency of

at such a proposition, and considering the high authority by which it is supported, I feel I ought to doubt and to distrust my own opinion. But I am bound to say, that I am not satisfied that the language of this ticket absolves the railway company from all liability for damage. I cannot help thinking that the owner of the goods never dreamed of such a thing when he signed this contract. In truth, this accident had nothing to do with the conveyance of the horse. The accidents referred to are those which occurred whilst the article is in a state of locomotion. The case of gross negligence, as it seems to me, is not pointed at by this contract." And in McManns *v.* Lancashire & Yorkshire Railw., 2 H. & N. 593; s. c. 30 Law Times, 321, the same rule is maintained as in Chippendale *v.* Lond. & Yorkshire Railw., so late as January, 1858.

In the late case of Wise *v.* The Great Western Railw., 36 Eng. L. & Eq. 574; s. c. 1 H. & N. 63, where a horse was delivered to defendants to be carried to W., and the person delivering it signed a writing, agreeing to abide by a notice contained in it, that the directors would not be answerable for damage done to any horses conveyed by the railway, and the horse reached the station at W. safely, but the company's servants either did not notice it, or forgot that the horse had arrived, and upon the plaintiff's calling for it the next day it was discovered in a horse-box on the siding, and found to have sustained serious injury from cold, and remaining in a confined position all night; held, that the company were protected under the statute by the signed contract. And it would seem that in such case the company would not be liable independent of the contract, the first fault being plaintiff's not being there to receive the horse upon its arrival at the station. See *ante*, § 175.

It does not seem to be regarded as important aside from the statute that the owner of the goods should sign any writing, or indeed that he should even receive a printed ticket, on notice of terms of carriage; but if he is in any way made aware of the terms upon which the carrier expects to receive his goods, and consents to deliver them without the carrier, or some one authorized to act upon his behalf, distinctly receding from the terms of the notice, he is bound by it. The York, Newcastle, & Berw. Railw. *v.* Crisp, 14 C. B. 527; s. c. 25 Eng. L. & Eq. 396. In the case of Walker *v.* The York & North M. Railw. Co., 2 El. & Bl. 750; s. c. 22 Eng. L. & Eq. 315, the owner of the goods distinctly informed the station-agent that the company's notice was not binding upon him. Yet inasmuch as the notice itself stated that neither the station-clerk nor other servants of the company had any authority to alter or vary the terms of the notice, the court held the plaintiff bound by these terms, one of which was, that the company were not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any market, nor for any loss or damage arising from any delay or stoppage, &c.

The learned judge, at the trial, told the jury that if the plaintiff had been served with the notice, and afterwards forwarded the fish, they ought to infer an agreement on his part to be bound by the terms of the notice, unless there appeared an unambiguous refusal on his part to be bound by the notice, and an acquiescence by the company in that refusal. It was held by the full bench, that

judicial administration to bewilder and to delude the wisest and the most profound, when they suffer themselves to be seduced into the belief that it is safe to follow any theory or abstraction, however specious, a moment longer than its results commend themselves to our sense of justice, certainly after they begin most unequivocally to excite sentiments of a more painful character, as many of the English decisions upon the subject of carriers' exemption from liability, even for gross neglect and wilful misconduct, could scarcely fail to do, when it was borne in mind that the entire business population of the realm almost was at the mercy of these same carriers. It is surely not to be regarded as matter of surprise, that the legislature felt compelled to interfere, to restore something of the reasonable responsibility of common carriers.[22]

the direction was right. See also Morville *v.* Great Northern Railw., 10 Eng. L. & Eq. 366; Willoughby *v.* Horridge, 12 C. B. 742; s. c. 16 Eng. L. & Eq. 437; Crouch *v.* London & Northwestern Railw., 7 Exch. 705.

And the case of Fowles *v.* The Great Western Railw. Co., 7 Exch. 699; s. c. 16 Eng. L. & Eq. 531, although determined upon a question of variance, clearly assumes the ground that a carrier's notice will exonerate him from his general obligation. York, Newcastle, & Berw. Railw. *v.* Crisp, 14 C. B. 527; s. c. 25 Eng. L. & Eq. 396.

But the case of Hearn *v.* The London & S. W. Railw., 10 Exch. 793; s. c. 29 Eng. L. & Eq. 494 seems to manifest, in some respects, a disposition in the English courts to hold common carriers to something like reasonable accountability, which some of the former cases had apparently regarded as nearly hopeless, under their most extraordinary notices. But we shall refer to this case more at length under § 185, where the present state of the English law is stated.

Many of the later cases in this country seem still disposed to hold the carrier to his common-law responsibility, unless he show a special contract to exonerate him from it, or a notice brought home to the owner of the goods, and assented to by him. *Ante*, § 177, n. 3; § 178, n. 21; and even in that case he is still responsible for ordinary care.

And if a loss occur in a case where the carrier is exempted, by special contract, from certain risks, the burden of proof is upon the carrier to show that the loss occurred in consequence of such excepted risks. Davidson *v.* Graham, 2 Ohio N. S. 131. See also Slocum *v.* Fairchild, 7 Hill, 292; Whiteside *v.* Russell, 8 Watts & S. 44; Baker *v.* Brinson, 9 Rich. 201. See also Berry *v.* Cooper, 28 Ga. 543.

But it was held, that where gold dust was received on board a steamboat, with express notice from the clerk of the boat that he would receive it only upon condition that no charge was to be made and no responsibility incurred, and the dust was stolen from the boat without any negligence on the part of the officers of the boat, the owners were not liable. Fay *v.* Steamer New World, 1 Cal. 348.

The carrier is bound to carry safely, and if he fail to do so the burden is upon him to show a valid excuse. But if the contract of affreightment provide that such carrier shall not be liable for unavoidable damages of navigation, this has been construed to mean unavoidable by them, with the exercise of all the precaution, care, and skill, which the law demands of common carriers.[23] If the accident fell upon them without any previous fault of theirs, but in consequence of the vessel and crew proving deficient, after they had done all in their power, it is here said the defendants should be as free from liability as from fault. But common carriers should see to it that they have a sufficient boat and crew, and the fact it proves otherwise would seem to charge them with fault. But a loss by collision is covered by the exception in the bill of lading, "unavoidable dangers of the river navigation," if the carrier was without fault, although the collision was caused by the negligence of those navigating the other vessel. Under the late English Railway and Canal Traffic Act, if the carrier refuse to receive the goods, unless the owner assent to certain conditions which the judge trying the case considers reasonable, and the goods are left on these conditions, the carrier is not liable as a common carrier, but only upon the special undertaking.[24]

15. In a recent case [25] before the United States Supreme Court, it was held that carriers may, by express contract with the owner, limit or qualify their common-law responsibility, provided such contract do not attempt to cover losses by negligence or misconduct. Thus where the bill of lading exempted the carriers from responsibility for loss by fire, and the goods were destroyed by fire without the fault of the carriers, they were held excused.[25]

16. The Act of Congress of 3d March, 1851, exempts the owners of vessels from responsibility for losses by fire caused by the negligence of their officers or agents, in which the owners had no direct participation. The proviso to this act allowing parties to contract in regard to the responsibility of such owners, refers to express contracts.[26] A local custom that ship-owners shall be responsible

[23] Hayes *v.* Kennedy, 3 Grant, 351; s. c. 41 Penn. St. 378. The meaning of the terms "act of God," "inevitable accident," &c., are here discussed.

[24] White *v.* Great Western Railw., 40 Eng. L. & Eq. 255; s. c. 2 C. B. (N. S.) 7.

[25] York Co. *v.* Central Railw., 3 Wallace, 107.

[26] Walker *v.* Transportation Co., 3 Wallace, 150.

in such cases for the negligence of their officers and agents is not a good custom, being directly opposed to the statute.[26]

SECTION XIII.

Notices as to Ordinary and Extraordinary Responsibility of Carriers.

1. *American writers and cases adopt this distinction.*
2. *The English cases do not seem to recognize it.*
3. *The question often raised under English statute.*
4. *Held reasonable to claim exemption from risk in transporting fresh fish.*
5. *So in carrying dogs and horses may require value to be stated.*
6. *How limitation must be claimed and secured.*
7. *Unreasonable conditions stated.*
8. *Cannot claim exemption from all responsibility, &c.*
9. *Same point further illustrated.*
10. *Case of injuring cattle by carrying beyond the station.*
11. *Exception of one risk cannot cover another.*
12. *Carrier always responsible for negligence.*

§ 179. 1. Many of the American writers, and some of the American courts, point to a distinction between notices of carriers, which propose to exonerate the carrier from all liability, even for gross neglect and possibly for positive misfeasance and wrong, and such as have reference only to exemption from that extraordinary responsibility imposed by the common law, by which they become insurers.[1] This distinction is pointed out by Prof. Greenleaf,[2]

[1] Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. 186–206, adopts the following language upon this subject: "But we regard it as well settled, that the carrier may, by general notice, brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions, as having notice of the kind and quantity of the things deposited for carriage, and a certain reasonable rate of premium for the insurance paid, beyond the mere expense of carriage."

[2] 2 Greenl. Ev. § 215, where the author seems to put forth substantially the same view. "It is now well settled that a common carrier may *qualify his liability*, by a *general notice* to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly. But the right of a common carrier, by a general notice to *limit*,

and adopted by Mr. Angell in his treatise on Carriers.[3] And Prof. Parsons, in his treatise upon Contracts, has an elaborate and learned note upon the subject, in which he adopts fully the distinction, and arrives at the same conclusion here suggested.[4]

2. But the English cases do not seem to have brought out this distinction so clearly as the American writers upon this subject. It seems to be supposed, by many of the English judges, and some of the late English cases seem to go that length, under their late statutes (which we have referred to, §§ 178, 185), that there is no positive objection to recognize the right of a common carrier to stipulate for exemption from all liability, even for gross neglect, or positive misfeasance.[5]

3. Under the more recent English statute,[6] requiring carriers to annex only reasonable conditions to notices or special contracts connected with their transportation, the question has very often arisen of late, and the distinction between ordinary and extraordinary hazards has been often alluded to in discussing questions under that statute.

4. Thus a contract to transport fresh fish was held to involve such extraordinary risks that the carrier might reasonably annex

restrict, or *avoid the liability* devolved upon him by the common law on the most salutary grounds of public policy, has been denied in several of the American courts, after the most elaborate consideration."

[3] Angell on Carriers, § 245.

[4] 1 Parsons on Contracts, 711, n. (*h*.)

[5] Maving *v*. Todd, 1 Starkie, 72. This was a case where the goods, while upon the premises and in the care of the carrier, had been destroyed by an accidental fire. It appearing that the carrier had so limited his responsibility that it did not extend to loss by fire, *Holroyd* submitted whether defendants could exclude their responsibility altogether. This was going further than had been done in the case of carriers who had only limited their responsibility to a certain amount. Lord *Ellenborough*, Ch. J., "Since they can limit it to a particular sum, I think they may exclude it altogether, and that they may say we will have nothing to do with fire." Leeson *v*. Holt, 1 Starkie, 186, is similar. This was where the carrier had given notice that the species of goods for which the suit was brought would be "entirely at the risk of the owners, as to damage, breakage, &c. Lord *Ellenborough*, Ch. J., said, in summing up to the jury, "In the present case they (the carriers) seem to have excluded all responsibility whatsoever, so that under the terms of the present notice, if a servant of the carrier had, in the most wilful and wanton manner, destroyed the furniture intrusted to him, the principal would not have been liable." See Phillips *v*. Edwards, 3 H. & N. 813.

[6] 17 & 18 Vict. c. 31, § 7.

a condition relieving him from all responsibility in consequence of any delay in the arrival of the trains and consequent loss of market, unless it arose from his own gross negligence.[7]

5. And it has often been held that carriers might reasonably limit the extent of their responsibility for the loss or injury of dogs and horses on their trains, to a certain average and moderate value, unless the value was declared and a premium for insurance above the average value paid.[8] The reasonableness of such a condition is based somewhat upon the fanciful value often attached to these animals.

6. But under the English statute[6] the carrier can only restrict his common-law responsibility by a reasonable limitation, which is embraced in a written contract signed by the party interested, or his agent, and such contract must either in itself, or by reference, set out or embody the condition. A general notice only consented to by the party would be valid for limiting the common-law liability of the carrier; but it must under the statute be embodied in a formal contract in writing, signed by the owner or person delivering the goods, and must be decided to be reasonable by the court.[9]

7. A condition exempting the carrier from all responsibility is unreasonable, and so is a condition that the carrier shall not be responsible for any damage unless pointed out at the time of delivery by the carrier.[10] The burden of showing the reasonableness of a condition annexed to the carrier's undertaking rests upon such carrier.[9]

8. It was held in one case,[11] that as carriers were bound to carry

[7] Beal *v.* Devon Railw. Co., 8 W. R. 651. It is here said, that in the case of a carrier, gross negligence includes the want of that reasonable care, skill, and expedition which may properly be expected from him. s. c. 3 H. & C. 337, in Exchequer Chamber.

[8] Harrison *v.* London, Brighton, & So. Coast Railw. Co., 2 B. & S. 122; s. c. 6 Jur. (N. S.) 954.

[9] Peek *v.* North Staffordshire Railw. Co., 9 Jur. (N. S.) 914; s. c. 10 Ho. Lds. Cas., 473; Aldridge *v.* Great Western Railw. Co., 15 C. B. (N. S.) 582. It is here held that a carrier is not to be regarded as a mere gratuitous bailee in carrying back vessels free of charge, by force of contract made at the time of carrying them filled for pay.

[10] Lloyd *v.* Waterford & Limerick Railw. Co., 9 Law T. (N. S.) 89, 15 Ir. Com. L. 37; Allday *v.* Great Western Railw. Co., 11 Jur. (N. S.) 12.

[11] Garton *v.* Bristol & Exeter Railw. Co., 1 El., Bl., & S. 112; s. c. 7 Jur. (N. S.) 1234.

for all who applied, and on reasonable terms, they could not make a condition excusing them from all responsibility for packages insufficiently packed.

9. So, also, a condition on cattle tickets, that the carrier shall be free from all risk or responsibility with respect to any loss or damage arising in the loading or unloading, or in the transit, from any cause whatever, it being agreed that the animals are carried at the owner's risk, and that he is to see to the efficiency of the wagon before the stock is placed therein, and complaint to be made in writing to the company's agent before the wagon leaves the station, is neither just nor reasonable;[12] and such a special contract cannot be maintained under the English statute, and it would seem ought not to be regarded as fairly and freely entered into by the owner, in the absence of all statutory provision.

10. Where cattle carried beyond the place of destination, and being out of condition, are injured in the sense of that term, under the English statute, and unquestionably so under the general responsibility of the carrier, the carrier cannot excuse himself by a general contract with the owner to be relieved from all responsibility for damage in overcarriage, delay, or in the conveying or delivery of said animals.[13]

11. At the plaintiff's request, the employees of a railway company, contrary to their general instructions, attached his freight car to a passenger train, he agreeing "to run all risks." Owing to an accident, occurring through the negligence of the company's servants, and not, to any extent, caused by attaching the freight car, the plaintiff received an injury and the company were held responsible, the plaintiff's risk being assumed solely with reference to the effects of attaching the freight car.[14]

12. And where the defendants, carriers in India, contracted with the government, by which troops were to be transported, but their luggage, among which were plaintiff's goods, were to remain in charge of a military guard, the company accepting no responsibility, the goods were destroyed by the company's negligence, and they were held responsible, as for a breach of duty, for any

[12] Gregory *v.* West Midland Railw. Co., 2 H. & C. 944; s. c. 10 Jur. (N. S.) 243.

[13] Allday *v.* Great Western Railw. Co., 11 Jur. (N. S.) 12.

[14] Lackawana, &c. Railw. *v.* Cheneworth, 52 Penn. St. 382.

loss occurring through their own negligence, while the goods were in their possession.[15]

SECTION XIV.

Responsibility for Carriage beyond Company's Road.

1. *English rule to hold first company liable to the end of the route.*
2. *This rule not followed in the American courts.*
3. *But company may undertake for whole route.*
4. *This is presumed when they are connected in business.*
5. *Case of refusal to pay charges demanded, and return of goods before reasonable time.*
6. *Carriers only responsible for safe carriage and delivery to next carrier according to ordinary usage.*
7. *Must follow special directions.*
8. *Makes no difference that part of line is by boat and part by railway.*
9. *English rule as to implied contract for the entire route.*
10. *Receiving freight for entire route binds to that extent unless proof be given to rebut that implication.*

§ 180. 1. The disposition of the English courts, since the establishment of railways, has seemed to be to regard parties who receive goods, and book them for a certain destination, as carriers throughout the entire route.[1] Since the first case which assumed this position,[2] there has not been manifested any disposition to recede from it.[3] And the English courts have extended the same rule to carriers in England, in the direction of Scotland, where the goods are received and booked for points beyond the limits of England.[4] And this rule has been carried so far in the English courts that even where the loss is shown to have occurred upon one of the subsequent roads in the route, it is held that the contract is exclusively with the first company, and that there is no right of action in favor of the owner against any of the subsequent companies on the route.[5] The same rule is adopted in regard to

[15] Martin *v.* Great Indian Pen. Railw., Law Rep. 3 Exch. 9.

[1] Hodges on Railways, 615.

[2] Muschamp *v.* Lancaster & Preston Railw., 8 M. & W. 421.

[3] Watson *v.* Ambergate, Not., & Boston Railw., 15 Jur. 448; s. c. 3 Eng. L. & Eq. 497; Scotthorn *v.* South Staffordshire Railw., 8 Exch. 341; s. c. 18 Eng. L. & Eq. 553; Wilson *v.* York, N., & B. Railw., 18 Eng. L. & Eq. 557.

[4] Crouch *v.* London & Northwestern Railw., 14 C. B. 255; s. c. 25 Eng. L. & Eq. 287.

[5] Bristol & Exeter Railw. *v.* Collins, 7 Ho. Lds. Cas. 194; s. c., 5 Jur. (N. S.) 1367. See *post*, n. 9.

passenger baggage.[6] It seems to us, that by reason of the pressure of two questions in the case last named, the House of Lords, after great labor and pains, have really escaped from a threatening dilemma by falling into more difficulty and doubt, not to say confusion, than either of the alternatives of the original dilemma presented. There was no difficulty in saying that an exemption from responsibility for loss by fire, contained in a receipt-note given by the first company, by fair construction extended to the entire route, although contained only in the written contract with the first company. But the Court of Queen's Bench and the Exchequer Chamber differed upon this point. There would have been more reason in saying, as the American courts do, that the first company is not responsible for the miscarriage of the other companies. But the court of last resort in England have now put the crowning climax upon this rule, by saying that subsequent companies are not responsible as carriers to the owner of the goods. This is a rule which some of the learned judges dissent from, and which others adopt upon the ground of the written contract in this case; and which we should expect would be ultimately abandoned, as founded upon no fair principle of reason or justice. But if the law of England is altered in this respect, it must be by statute, as the House of Lords will not hear argument upon a point once determined in that court. The difficulty seems to have arisen out of the extreme views adopted there in Muschamp *v.* Lancaster & Preston Railway.[2] And in a later case,[7] where oxen were sent from the Craven Arms station on the Shrewsbury and Hereford Railway to Birmingham, that company's line extending to Shrewsbury, and the defendants' from that to Birmingham, the plaintiff's drover signed a way-bill containing the following condition: "For the convenience of the owner the company will receive the charges payable to other companies for conveyance of the cattle over their line of railway, but the company will not be subject to liability for any loss, delay, default, or damage arising on such other railway." One sum was charged for the carriage, which was to be paid at Birmingham. The oxen were placed in trucks belonging to the defendants, and on the arrival of the train at Wolverhampton, on defendants' line, it was found that the bottom of one of the trucks was broken, and one of the oxen

[6] *Ante*, § 175, n. 3.

[7] Coxon *v.* Great Western Railw. Co., 5 H. & N. 274.

dead, and others injured. It was held that the contract was so exclusively with the Shrewsbury and Hereford Company for the entire journey that the defendants were not liable.

2. But this rule has been very seriously questioned in this country. The general view of the American courts upon this subject is, that in the absence of special contract, the rule laid down in the earlier English cases,[8] that the carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier, is the more just and reasonable one, and this is the doctrine which seems likely to prevail in this country, although there is no doubt some argument to be drawn from convenience in favor of the English rule.[9]

[8] Garside *v.* Trent & Mersey Navigation Co., 4 T. R. 581.

[9] Farmers' & Mechanics' Bank *v.* Champlain Transp. Co., 16 Vt. 52; 18 Vt. 131; 23 Vt. 186; Van Santvoord *v.* St. John, 6 Hill (N. Y.), 158; Hood *v.* New York & N. H. Railw., 22 Conn. 1; s. c. 22 Conn. 502; Nutting *v.* Conn. R. Railw., 1 Gray, 502; Jenneson *v.* Camden & Amb. Railw., Dist. Court Phil. 4 Am. Law Reg. 234. *Stroud*, J., in this last case, reviews all the cases upon the subject, and concludes, that in this country the courts have held, that when goods are delivered to a carrier marked for a particular place, but unaccompanied by any other directions for their transportation and delivery, except such as might be inferred from the marks themselves, the carrier is only bound to transport and deliver them, according to the established usage of the business in which he is engaged, whether that usage were known to the other party or not.

The learned judge, in delivering his opinion, said: "The only question is whether this receipt contained an undertaking by the defendants to carry the chest beyond the terminus of their line, or, rather, beyond the place named in the receipt, the 'office of the defendants, in New York.'

"The language of the receipt is plain and positive, 'which we promise to deliver at our office in New York, upon payment of freight therefor at the rate of 26¼ cents per 100 lbs.' For what purpose the memorandum, 'to be shipped for Camden, Ohio, from New York,' was made, we are not called upon to determine. We do determine that it did not enlarge the defendants' promise, as set forth in the body of the instrument; that it does not import an agreement by the defendants, that they would transport the chest to Camden, Ohio, and there deliver it to the plaintiff, which is the allegation in the declaration. It was admitted by the plaintiff's counsel that the chest was safely carried to New York, that it had been put in the way of transportation to its destination, by delivery to a proper railway transportation company for that purpose, but what became of it afterwards could not be ascertained.

"Questions very similar to that which has here arisen, have occurred several times in England, and in some of our sister States. Muschamp *v.* The Lancaster & Preston Junction Railw. Company, 8 Mees. & Wels. 421, was the case of a parcel delivered at Lancaster, addressed to a place in Derbyshire, beyond the line of the Lancaster and Preston Railway. Baron *Rolfe*, before whom the cause was

3. There are many cases, where the American courts have held the carrier liable beyond the limits of his own route, upon the

tried, told the jury, that a carrier who takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, undertakes *prima facie* to carry the parcel to its destination, and that the rule was not varied by the fact that that place was beyond the limits within which the carrier professed to carry. This ruling was sanctioned by the court in *banc*.

"In a subsequent case, Watson *v.* The Ambergate, Nottingham, & Boston Railw. Company, 15 Jur. 448; s. c. 3 Eng. L. & Eq. 497, the decision in Muschamp *v.* The Lancaster, &c., was approved.

"In this country the courts have held, that when goods are delivered to a carrier, marked for a particular place, but unaccompanied by any other directions for their transportation and delivery except such as might be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether that usage were known to the party from whom they were received or not. Van Santvoord *v.* St. John, 6 Hill (N. Y.), 157; Farmers' and Mechanics' Bank *v.* Champlain Transportation Co., 18 Vt. 140, and 23 id. 209.

"In Nutting *v.* Connecticut River Railroad Co., 1 Gray, 502, a receipt was given of this description: 'Northampton, Mass., received of E. Nutting for transportation to New York, nine boxes planes, marked,' &c. Two of these boxes were lost between Springfield, Mass., and New Haven, Conn., being beyond the terminus of the defendants' road. No connection in business was shown to exist between the defendants and the proprietors of the connecting road, nor was pay taken for the transportation beyond Springfield, which was the terminus of the defendants' road.

"The Supreme Court of Massachusetts held, that the true construction of this contract was, that the goods should be safely carried to the terminus of the defendants' road, and there delivered to the carriers on the connecting road, to be forwarded to their proper destination. This decision was made upon a case stated. Muschamp *v.* Lancaster & Preston Junction Railw., 8 M. & W. 421, was cited on behalf of the plaintiff, but the court disapproved of that decision, and held that, to bind a company under the circumstances of this case, the burden was upon the plaintiff to show a special contract by the company to carry the goods beyond the terminus of its own railway. There is another case which was cited, on the argument before us, by the counsel of the defendant. In this it was decided by a divided court, that, where a passenger paid the fare to a point several miles beyond the terminus of the defendants' railroad, receiving from the conductor of the cars a ticket in this form: 'New Haven and Northampton Company — Conductor's Ticket — New Haven to Collinsville by stage from Farmington,' — the company was not responsible for any injury sustained by the passenger on the stage road between Farmington and Collinsville. The case was tried twice. A new trial was granted after the first trial, on a ground corresponding with that taken in Nutting *v.* The Connecticut River Railroad Company, 1 Gray, 502; but, after the second trial, in which the verdict was, as it had been on the first, for the plaintiff, the court, in setting aside the second verdict,

ground of a special undertaking, either express or implied, but whether any such contract exists is regarded as a matter to be

rested its opinion on the ground that the conductor had no authority to bind the company to carry beyond the limits of its railway, because the company itself could not make any such binding contract. Hood *v.* N. Y. & N. H. Railroad Co., 22 Conn. 1, 502.

"The case before us does not require, in support of the conclusion to which we have come, the adoption of the rulings in any of the cases in our sister States which have been referred to. The nonsuit on the trial was placed distinctly upon the principle that the evidence did not support the declaration; that the *alegata* and *probata* did not agree. The declaration alleged that the goods were to be carried from Burlington, New Jersey, to Camden, Ohio; whereas the receipt was express, that they were to be delivered at the company's office at New York, and the charge of freight was to New York only, and not beyond."

In the case of United States Express Company *v.* Rush, 24 Ind. 403, the plaintiffs in error received a package of money to be carried to a point beyond their route. They carried it to the point on their route nearest the point of destination, and delivered it to "Winslow's Express," the usual communication from that point to the place of destination, and the package was lost while in their custody. The plaintiffs' receipt for the package specified that they undertook to forward the package to the point nearest its destination reached by that company, and that they should be held liable as forwarders only. It was held, the plaintiffs might become liable as common carriers without compliance with the statute declaring express companies common carriers, but that having done all which their contract required they were not responsible further. Where a ticket, sold by a railway company to a point upon a connecting road, contained a printed stipulation that in selling the company acted as agent only for roads beyond the terminus of their own, and assumed no responsibility therefor, the company is not liable to a passenger for the loss of baggage not occurring upon the line of their own road. Penn. Cent. Railw. *v.* Schwarzenberger, 45 Penn. St. 208. See also Hunt *v.* N. Y. & E. Railw., 1 Hilton, 228; Dillon *v.* Same, id. 231.

In the recent case of Converse *v.* Norwich & N. Y. Transportation Co., 33 Conn. 166, where the defendants received goods for transportation beyond their own line, which was confined to the water, the goods being addressed to S., and receipted by the defendants as "goods bound for S.," that point being reached by railway, after the termination of defendants' line, there being a usage known to the shipper, to carry through freight, at reduced prices, by virtue of an arrangement for that purpose between the defendants and the railway company, and the proceeds divided between the two companies in certain proportions, a bill for the through freight being made out, and collected and receipted for by the railway company, at the place of delivery, it was decided that as there was no unexplained evidence, that the defendants held themselves out as carriers throughout the entire line to S., and no express contract to carry to S., the defendants' contract was performed on delivery to the railway company.

But in Peet *v.* Chicago & Northwestern Railw., 19 Wisc. 118, where the defendants, whose line terminated at Chicago, receipted for one hundred barrels of flour at Neenah, on their own line, "contract from Neenah to New York at $2.25

determined from all the facts and attending circumstances of the case, and will more generally be an inference for the jury than the court, unless it depends upon the effect of written stipulations, and even then will often be affected more or less by attending facts and circumstances.[10]

4. The American cases upon the subject, with rare exceptions, recognize the right of a railway company to enter into special contracts to carry goods beyond the line of their own road. And where different roads are united in one continuous route, such an undertaking, in regard to merchandise received and booked for any point upon the line of the connected companies, is almost matter of course. It is, we think, the more general understanding upon the subject, among business men and railways, their agents and servants.[11] And this is so, although the connection among

per barrel," it was held that the contract was to deliver the flour in New York, and the company were responsible as common carriers for the entire route.

And where separate companies are engaged in a common undertaking for the transportation of freight over a long line, of which each associate forms a link, giving through bills of lading and charging through freight, each will be liable as a common carrier for the whole distance. Cin., Ham., & Day. Railw. *v.* Spratt, 2 Duvall, 4.

But where the receipt or bill of lading contains express notice that the first company will not be responsible as carriers beyond their own line, the fact that it extends to the entire route will not render them responsible as common carriers beyond their own limits. Detroit & Milw. Railw. *v.* Farmers' Bank, 20 Wisc. 122.

[10] Weed *v.* Sar. & Sch. Railw., 19 Wend. 534; Bennett *v.* Filyaw, 1 Flor. 403. The Laurens Railway Company gave receipts for cotton "to be delivered on presentation of this receipt at Charleston." The cotton reached the terminus of the Laurens Railway in safety, and there, without bulk being broken, was delivered in the same cars to the Greenville & Columbia Railway to be carried on. It was afterwards lost. Held, that the Laurens Railway Company were liable, their undertaking being special to carry to Charleston. Kyle *v.* Laurens Railw., 10 Rich. (S. C.) 382. See Kreuder *v.* Woolcott, 1 Hilton, 223; Ill. Cent. Railw. *v.* Copeland, 24 Ill. 332; Same *v.* Johnson, 34 Ill. 389.

[11] Noyes *v.* Rut. & Bur. Railw., 27 Vt. 110; Wilcox *v.* Parmelee, 3 Sandf. 610; Ackley *v.* Kellogg, 8 Cowen, 223. Note of Editors to Am. Law Reg. 4 vol. 238, *et seq.*, where this subject is very elaborately and very satisfactorily discussed. See Bradford *v.* S. C. Railw., 7 Rich. 201; Mar. Mutual Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Mallory *v.* Bennett, id. 234.

In an English case, Collins *v.* The Bristol and Exeter Railw., 11 Exch. 790; s.c. 36 Eng. L. & Eq. 482, a carrier of goods had intrusted them to the Great Western Railw., to be carried from Bath to Torquay. To accomplish the transit, the goods must pass over three railways, the defendants' company being one, and the goods were burned upon their line. The receipt-note, or bill of

such roads is only temporary, and merely incidental, for the convenience of transacting business, one road acting sometimes as agent for other roads, by their procurement or adoption.[12] And if

lading, given by the Great Western Railway, specified that the company were not to be answerable for loss by fire. The carriage was paid for the whole distance to the Great Western Railway.

The defendants entered into a rule, at the trial, to take no advantage of the action not being brought against the Great Western Railway.

Alderson, B., said, "We think the contract for the conveyance of the van of furniture was one contract, and that it was made with the Great Western Company alone. They contracted, in express terms, upon the face of the receipt-note, to carry the goods from Bath to Torquay. We think, therefore, there was a contract by the Great Western Company to carry the goods the whole way to Torquay, and, of course, the condition as to fire extends to and protects from such loss, during the entire journey. And this is in exact conformity with the judgment of this court, in Muschamp *v.* The Lancaster & Preston Junction Railw. Company, which has been frequently confirmed and acted upon in all the courts of Westminster Hall. We therefore think that no action is maintainable against any of the companies, and a nonsuit ought to be entered." But this case is reversed in the Exchequer Chamber, 1 H. & N. 517; 28 Law Times, 260; s. c. 38 Eng. L. & Eq. 593. In the House of Lords it was held that the judgment of the Court of Exchequer was right, and ought to have been affirmed. 5 H. & N. 969; 5 Jur. (N. S.) 1367.

[12] Wilbert *v.* New York & Erie Railw., 2 Kernan, 245, 255. In this case, *Hand*, J., said, "There has been some question how far one railroad can be sued for the negligence of another, where the transportation is continuous and entire over their respective roads. See Weed *v.* Saratoga & Sch. Railw., 19 Wend. 534; St. John *v.* Van Santvoord, 25 id. 660; s. c. 6 Hill, 157; Muschamp *v.* Lancaster & Preston Junction Railw., 8 M. & W. 421; Crouch *v.* London & N. W. Railw. Co., 14 C. B. 255; 1 Parsons on Cont. 686–87, and notes; Champion *v.* Bostwick, 18 Wend. 175; Fromont *v.* Coupland, 2 Bing. 170; Russell *v.* Austwick, 1 Sim. 52. In some of the cases above cited, the corporation to whom the property was first delivered was held liable for the default of other corporations, over whose lines the property was or should have been carried, and where a carrier is in the habit of receiving and forwarding goods directed to any particular place, an agreement on his part to take them has been presumed, but where their operations are entirely disconnected there is no partnership. 6 Hill, 157. But in many cases in which different railroad corporations cannot be considered by the public strictly as partners, they may and often do act as agents of each other."

In 23 Vt. 209, it was said, "There has been an attempt to push one department of the law of carriers into an absurd extreme, as it seems to us, by a misapplication of this rule of the carrier being bound to make personal delivery. That is, by holding the first carrier upon a route consisting of a succession of carriers, liable for the safe delivery of all articles at their ultimate destination. Muschamp *v.* The L. & P. Junction Railw. Co., 8 M. & W. 421, is the only English case much relied upon in favor of any such proposition, and that case is,

it be the usual course of the carrier's business to forward goods beyond his route by sailing vessels, he is not liable for not forward-

by the court, put upon the ground of the particular contract in the case; and also that 'All convenience is in favor of such a rule,' and 'there is no authority against it,' as said by Baron *Rolfe*, in giving judgment. St. John *v.* Van Santvoord, 25 Wend. 660, assumed similar ground.

"But this court, in this same case (16 Vt. 52), did not consider that decision as sound law or good sense. And it has since been reversed in the Court of Errors. Van Santvoord *v.* St. John, 6 Hill, 158. And this last decision is expressly recognized by the court, 18 Vt. 131. Weed *v.* Saratoga & Sch. Railw. Co., 19 Wend. 534, is considered by many as having adopted the same view of the subject. But that case is readily reconciled with the general rule upon the subject, that each carrier is only bound to the end of his own route, and for a delivery to the next carrier, by the consideration that in this case there was a kind of partnership connection between the first company and the other companies, constituting the entire route; and also that the first carriers took pay and gave a ticket through, which is most relied upon by the court. But see opinion of *Walworth*, Ch., in Van Santvoord *v.* St. John, 6 Hill, 158. And in such cases, where the first company gives a ticket and takes pay through, it may be fairly considered equivalent to an undertaking to be responsible throughout the entire route. The case of Bennett *v.* Filyaw, 1 Florida, 403, is referred to in Angell on Carriers, § 95, n. 1, as favoring this view of the subject.

"The rule laid down in Garside *v.* Tr. & M. Nav. Co., 4 T. R. 581, that each carrier, in the absence of special contract, is only liable for the extent of his own route, and the safe storage and delivery to the next carrier, is undoubtedly the better, the more just and rational, and the more generally recognized rule upon the subject. Ackley *v.* Kellogg, 8 Cow. 223. This is the case of goods carried by water from New York to Troy, to be put on board a canal boat at that place, and forwarded to the north, and the goods were lost by the upsetting of the canal boat, and the defendants were held not liable for the loss beyond their own route. The cases all seem to regard this as the general rule upon the subject, with the exception of those above referred to; one of which (8 M. & W. 421) considers it chiefly a matter of fact, to be determined by the jury as to the extent of the undertaking; one (25 Wend. 660) has been disregarded by this court, and reversed by their own Court of Errors (6 Hill, 158); one (19 Wend. 534) is the case of ticketing through upon connected lines; and one (1 Florida, 403) I have not seen." See also Nutting *v.* Conn. River Railw., 1 Gray, 502, and Elmore *v.* Naugatuck Railw., 23 Conn. 457. One company, chartering one of their boats to another company for a single trip, but retaining the charge of it and of navigating it, were held liable to a passenger for the loss of his baggage. Campbell *v.* Perkins, 4 Selden, 430. In Foy *v.* Troy & Boston Railw., 24 Barb. 382, it was held, that where goods were received by defendants at Troy, consigned to a person at Burlington, Vermont, it will be understood, in the absence of any proof to the contrary, as an undertaking to deliver the goods in the same condition as when received at the place of destination. And it is said in this case, that where property is so consigned, and is to pass over more than one road, that it is not the duty of the owner, in case of injury to his goods, to inquire how

ing a particular article by steam-vessel, unless the direction to do so be clear and unambiguous.[13]

5. In a very late case in the Court of Exchequer,[14] the plaintiff sent a parcel by defendants, to "Reynolds, Plymouth," who took it to the end of their route, and then passed it on by another railway, as their agents, to the house of Reynolds, and demanded 2*s*. 3*d*. for its carriage. Payment of this sum was refused, and 1*s*. 6*d*. only offered. On the morning of the next day the parcel was returned to London, and on that day the consignee sent to pay the 2*s*. 3*d*. under protest, and obtain the parcel. He then made search for it in London and elsewhere, but it could not be found, and he brought this action for a conversion. The jury found a tender of the 2*s*. 3*d*. and a demand of the parcel, in a reasonable time, and that the parcel was returned to London before a reasonable time, and a consequent conversion. It was held that the facts justified the finding.

6. Express companies have generally been held responsible only

many different companies make up the line between the place of shipment and the place of delivery, or to determine, at his peril, which company was liable for the injury. It is also said here, that if the company receiving freight for transportation desires to limit its responsibility to injuries occurring upon its own road, it should provide for such limitation in its contract. In a late English case, Willey *v*. The West Cornwall Railw., 30 Law Times, 261, the same propositions are maintained as in the case last cited, with the exception of the one last ruled, which did not arise. It is also said here, that the company are as much bound by a contract to carry beyond their own route, where the transportation is partly by water, as if it were all by rail, and that the company cannot defend upon the ground that a contract to carry beyond their own route is *ultra vires*.

[13] Simkins *v*. Norwich and New London Steamboat Co., 11 Cush. 102.

[14] Crouch *v*. Great Western Railw., 2 H. & N. 491. It is here held, that if a carrier contracts to carry goods to, and deliver them at a particular place, his duty at that place is precisely the same, whether his own conveyance goes the entire way, or stops short at an intermediate place, and the goods are conveyed by another carrier; and the carrier, or his clerk, at the place of destination, is the agent of the original carrier for all purposes connected with the conveyance and delivery and dealing with the goods, as his own clerk would have been at the place where his own conveyance stops. *Ante*, § 175, pl. 17.

Bramwell, B., who dissented from the decision in this case, says, in regard to the case of Scotthorn *v*. South Staffordshire Railw., 8 Exch. 341, *post*, § 181, "I reserve to myself the right to question its correctness on a fitting occasion."

Public policy in this country is unfavorable to an intermediate carrier's assuming the character of forwarder. Ladue *v*. Griffith, 25 N. Y. 364.

for the transportation to the end of their own line and careful delivery to the next company upon the route most direct to the destination of the parcel, with proper directions to the carriers to whom the parcel is successively delivered. And it has been said that where the goods, in such cases, are delivered to the carrier, marked for a particular destination without any specific instructions in regard to the transportation more than what is to be inferred from the marks on the package, the carrier is only bound to transport and deliver them according to the established usage of the business, whether that be known to the consignor or not. Consequently, where goods were sent from Detroit, by an express company, to New York, and came into the hands of the defendants' agents at Suspension Bridge, and were carried to Albany and delivered to the Hudson River Railway, common carriers between that city and New York, giving proper instructions to the latter company, it was held that defendants were thereby exonerated from further responsibility.[15]

7. Where special directions are given to a carrier in regard to the delivery of the goods, they must be followed, and if so, the carrier is exonerated from further responsibility. And where the company is accustomed to receive instructions as to goods

[15] Hempstead *v.* New York Central Railw., 28 Barb. 485. And in the case of McDonald *v.* Western Railw., 24 N. Y. 497, the rule of law is thus declared: Where goods are shipped and must pass through the hands of several intermediate carriers before reaching their destination, it is the duty of each to carry to the end of his own route, and, except the last, to deliver to the next carrier, and he will not excuse himself from responsibility by putting the goods in warehouse without any effort to have them go forward to their ultimate destination. And it is the duty of the owner of the goods to have them properly marked, and to present them to the carrier or his proper servants for that purpose to have them properly booked, and if by his neglect in this respect a wrong delivery and consequent loss occurs, without the fault of the carrier, the owner must bear the loss. But if the wrong delivery, even in such case, is the fault of the carrier, he is responsible, and cannot urge the default of the owner in defence, if notwithstanding that he might have avoided the loss by proper diligence on his part. The Huntress, Davies, 82.

And where, goods being consigned beyond the first carrier's line, on their arrival at the termination of their line, the second carrier called for them, but the first carrier not being then ready to attend to the delivery, it was arranged, for the convenience of the parties, that the goods should remain in warehouse until the next morning, and in the mean time they were destroyed by fire, it was held, that the first carrier's responsibility continued until actual delivery to the next carrier. Fenner *v.* Buffalo, &c. Railw., 46 Barb. 103.

to be carried beyond their own route, and the instructions are not obeyed, the carrier is liable for any loss or damage.[16]

8. And it makes no difference as we have seen that portions of the route are by steamboat and other portions by land where no railway exists. The English courts infer a contract to carry through.[17] And in such cases where there is an agreement between the railway and steamboat lines to run in connection and divide the through freights, it was held both companies are jointly liable for the entire route.[18]

9. Where a package was delivered to the agent of two connecting lines forming a continuous route, and the package was addressed to a person at the end of the route, and the agent altered the address so as to make it more obvious what course it was to be carried, as by writing "via Stafford" upon it, and delivered it to the first company on the route, it was held to be evidence of a contract by that company to carry the entire route.[19]

10. The American rule in regard to an implied contract for the entire route seems to be, that where the freight for the entire route is reckoned in one sum, and a receipt given for the entire route, it will be regarded as *prima facie* evidence of an undertaking for the delivery at the ultimate destination of the goods. But this presumption is rebutted by proof, that there is, in fact, no partnership connection between the different companies, but only one of mere agency for the convenience of the business, and that this was known to the consignor, or might have been learned on reasonable inquiry.[20]

[16] Michigan S. & N. Indiana Railw. *v.* Day, 20 Ill. 375. And in a later case, Illinois Central Railw. *v.* Johnson, 34 Ill. 389, it was held, that railway companies, receiving goods marked for places beyond their line, are impliedly bound to see them carried to their destination, according to the English rule before stated. *Ante*, n. 11.

[17] Wilby *v.* West Cornwall Railw., 2 H. & N. 702.

[18] Hayes *v.* South Wales Railw. Co., 9 Ir. Com. L. 474.

[19] Webber *v.* Great Western Railw. Co., 3 H. & C. 771.

[20] Angle *v.* Mississippi, &c. Railw. 9 Iowa, 487.

SECTION XV.

Power of Company to Contract to Carry beyond its own Limits.

1. *No doubt existed in regard to this power until very recently.*
2. *Receiving freight across other lines and giving ticket through.*
3–5. *Cases reviewed upon this point.*
6. *This may be shown by acts of company.*
7. *English courts hold company competent to contract to carry through entire route by sea and by land.*
8. *But this must be by express contract, ordinarily.*

§ 181. 1. It was for many years regarded as perfectly settled law, that a common carrier, which was a corporation chartered for purposes of transportation of goods and passengers between certain points, might enter into a valid contract to carry goods delivered to them for that purpose, beyond their own limits.[1] Most of the American cases do not regard the accepting a parcel, marked for a destination beyond the terminus of the route of the first carrier, as *prima facie* evidence of an undertaking to carry through to that point. But the English cases do so construe the implied duty resulting from the receipt.[2]

2. But the cases, until a very recent one,[3] do hold, that a railway company may assume to carry goods to any point to which their general business extends, whether within or without the particular state or country of their locality.[4] And it has generally been considered, both in this country and in the English courts, that receiving goods destined beyond the terminus of the particular

[1] *Ante*, § 180, and cases there cited; Moore *v.* Michigan Central Railw., 3 Mich. 23.

[2] *Ante*, § 180, and notes; Fairchild *v.* Slocum, 19 Wend. 329.

[3] Hood *v.* New York & N. H. Railw., 22 Conn. 502. See Elmore *v.* Naugatuck Railw., 23 Conn. 457. And in Naugatuck Railw. *v.* Waterbury Button Co., 24 Conn. 468, it was held, that a provision in the plaintiffs' charter, authorizing them to "make any lawful contract with any other railroad corporation in relation to the business of such road," only extended to contracts for the common use of such other roads as lay within the limits of plaintiffs' charter, and that it did not enable the company to enter into a contract to carry freight to the city of New York, either upon other railways or steamboats, and that such contract could not be inferred from the course of plaintiffs' business, and that having carried the goods to the end of their route and delivered them to the next carrier in the line of their destination, they were no further liable.

[4] *Ante*, § 180, and notes.

railway, and accepting the freight through, and giving a ticket or check through, does import an undertaking to carry through, and that this contract is binding upon the company.

3. The case of Hood *v.* the New York and New Haven Railway,[3] assumes the distinct proposition that the conductor could not bind the company by such contract, because the company had no power to assume any such obligation. The case is not attempted to be maintained upon the basis of authority, but upon first principles, showing therefrom the innate want of authority in the company. It must be admitted the reasoning is specious; so plausible indeed, that if the matter were altogether *res integra*, it might be deemed sound.

4. But it must be remembered that in the construction of all legislative grants, many things have to be taken, by implication, as accessory to the principal thing granted. And if we are not allowed to assume such indispensable incidents, as are necessary to the exercise of the powers conferred, in such a manner as to accomplish the main purpose in a reasonable and practicable mode, we shall necessarily be led into inextricable embarrassments. Hence we conclude this case may have assumed, possibly, too narrow grounds, and such as might render the principal grant of the company to become common carriers of freight and passengers, from New York to New Haven, less useful to the public, consistently with the security of the company, than the circumstances required. The strict and undeviating requirement in all cases, that all railways shall be restricted in their contracts for transporting persons, parcels, baggage, and goods, to the line of their own road, and a safe delivery to the next carrier, and that nothing like copartnership in the business of a particular route, consisting of different companies, could exist, would certainly be throwing serious hindrances in the way of business, without any adequate advantage.[4]

5. And it was held, in a recent case by the Supreme Court of Vermont, that railway companies, as common carriers, might make valid contracts to receive freight at, or to convey it to, points beyond the limits of their own road, and thus become liable for the acts or neglects of other carriers, not under their control; and that in regard to matters not altogether beyond the general objects of their incorporation, and which, upon a liberal construction, might fairly be considered as embraced within them, it was not

competent for the company to adopt the acts of their agents and officers so long as they proved beneficial, and when they proved otherwise, shield themselves from responsibility, by resorting to a more limited and literal construction of their corporate powers.[5]

[5] Noyes v. Rutland & Burlington Railw., 27 Vt. 110. The grounds of the decision are thus stated: "It seems to be now well settled that railway companies, as common carriers, may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers in no sense under their control. Muschamp v. Lancaster & Preston Junction Railw., 8 M. & W. 421; Weed v. Saratoga & Schenectady Railw., 19 Wend. 534; Farmers' & Mechanics' Bank v. Champlain Trans. Co., 23 Vt. 186.

"It has never been questioned that carriers, whether natural or artificial persons, might by usage or contract bind themselves to deliver parcels and merchandise beyond the strict limits of their line, in town and country; and in such case could only exonerate themselves by a personal delivery. 23 Vt. 186, and cases there cited.

"It seems to us, in principle, that these two propositions control the present case; for if a railway company may contract for carrying merchandise and parcels, beyond the limits of their line, where the carriage is by porters, stages, by steamboats or other water-craft, or by other railways, and this is to be justified upon the ground of usage and convenience, or common understanding and consent, the same rule of construction must equally extend to contracts to receive freight at points on the line before it reaches the company entering into the contract. It may be true, in one sense, that this is extending the duties and powers of the company beyond the strictest interpretation of the words of their charter. But the time is now past, when, as between the company and strangers, any such literal interpretation of the charter is attempted to be adhered to. It is true that such corporations, even as to strangers, are not allowed to assume obligations altogether beyond the general objects of their incorporation, as if they should assume to build steamboats, or other railways, perhaps. But within the general business of their creation a very considerable latitude is allowed in contracts with strangers. This is done for the advantage of the company, as well as others, and to avoid embarrassments in the common business of life, which must be constantly liable to occur upon any such limited construction of the powers of corporations as is contended for by the plaintiffs below. These corporations are now held liable for a nuisance, in obstructing highways; — for damages, in consequence of a departure from the ordinary and safe mode of constructing their embankments, although attempted in that form to aid a manufacturing interest by making the embankment serve a double purpose of a dam and embankment for the track of the road. * *Ante*, § 168, note 1; — and in many other cases, where, if the stockholders had interfered in the first instance, the agents of the company would have been restrained from doing the acts in the name of the company. But if the corporators acquiesce in the extension of the business of the company, even beyond the strict limits of its charter, upon the most literal interpretation, and strangers are thereby induced to contract upon the faith of the authority of the agents of such companies, the companies are not at

6. And parol evidence that a railway company duly incorporated in one State has held itself out, through its agents, as a common carrier over a railway in another State, is sufficient *prima facie* evidence of its capacity to contract for such carriage to support an action for merchandise intrusted to it.[6]

7. The English courts hold that it is not *ultra vires* for a railway company to contract to carry beyond its own route, by sea or by land.[7] And where the party contracted with the company to carry beyond their own line upon a connecting road, but signed a note, without noticing its contents, only extending to the point of departure from the first line, it was held the parol evidence of the extended contract was admissible, as it only supplemented the writing.[8]

8. There seems to be no question entertained by the American courts that railway companies and other transportation companies, either corporations or joint-stock associations, may bind themselves to transport goods or passengers beyond their own lines. But in one recent case it was considered this must be by express contract.[9] And in such case it is not material that the first company has no existing arrangement with other connecting lines for transportation beyond its own terminus.[9] And it has been held, that railway companies may run steamboats beyond their own termini for the purpose of completing the natural transit of freight and travel,[10] and if they do so, and hold themselves out as common carriers of freight and passengers for the entire route, they are bound to receive and carry for all who require it and are ready to comply with the ordinary terms of transportation.[10]

liberty to repudiate the authority of such agents when their transactions prove disastrous." And the principle of this case is maintained in Hart *v.* Rensselaer & Sar. Railw., 4 Selden, 37; Schroeder *v.* Hudson River Railw., 5 Duer, 55; Peet *v.* Chicago & Northwestern Railw., 19 Wisc. 118; Cin., Ham., & Day. Railw. *v.* Spratt, 2 Duvall, 4; Detroit & Mil. Railw. *v.* Farmers' Bank, 20 Wisc. 122; Angle *v.* Miss. &c. Railw., 9 Iowa, 487.

[6] McCluer *v.* Manchester & Lawrence Railw., 13 Gray, 124.

[7] Wilby *v.* West Cornwall Railw., 2 H. & N. 703.

[8] Malpas *v.* Southwestern Railw., Law Rep. 1 C. P. 336.

[9] Perkins *v.* Portland, &c., Railw., 47 Me. 573.

[10] Wheeler *v.* San Francisco & Alta Railw., 31 Cal. 46.

SECTION XVI.

Authority of the Agents and Servants of the Company.

1. *Board of directors have same power as company, unless restricted.*
2. *Other agents and servants cannot bind the company beyond their sphere.*
3. *Owner may countermand destination of goods through proper agent.*
4. *But an agent who assumes to bind the company beyond his sphere, cannot.*
5. *Ratification of former similar contracts, evidence against company.*
6. *Notice by company of want of authority in servants, renders their acts void.*
7. *Illustrations of the rule.*
8. *Servant may bind company even when he disobeys their directions.*
9. *Company responsible for the acts of servants of other companies.*
10. *The authority of the agent not affected by receiving the compensation himself.*
11. *The extent of agent's authority matter of fact.*
12. *The owner of ship responsible for the acts of the master, notwithstanding a charter-party.*

§ 182. 1. As the entire business of railways is of necessity transacted through the instrumentality of agents, the extent of their authority becomes a serious and important inquiry, as well for the stockholders as the public. As a general rule it may be safely affirmed that the board of directors have all the power which resides in the corporation, subject to such restrictions only as are imposed upon them by the charter and by-laws of the corporation.

2. The other agents of the company are confined to their several spheres of operation. Thus station agents, who receive and forward freight, have power to bind the company, by a contract, that the goods shall be forwarded to a point beyond the terminus of the company's road (on the line of another railway), before a particular hour, and this, it would seem, notwithstanding a general notice has been published, that the company would not be responsible for forwarding goods beyond the terminus of their own road.[1] So, too, it has been held to be a proper question to submit to the jury, under proper instructions, whether a particular servant, or officer, had not, under the circumstances, authority to bind the company.[2]

[1] Wilson *v.* York, Newcastle, & Berwick Railw., 18 Eng. L. & Eq. 557, in note. This was a case at Nisi Prius, before *Jervis*, Ch. J. The refusal of the station master, or of any one to whom he should refer the party, to deliver goods in his custody at the station, will bind the company, and if done without proper excuse, will render them liable in trover. Rooke *v.* Midland Railw., 16 Jur. 1069; s. c. 14 Eng. L. & Eq. 175.

[2] Scotthorn *v.* South Staffordshire Railw., 18 Eng. L. & Eq. 553; Schroeder

3. So, too, it would seem, that any one having put goods, or baggage, upon the company's trains, or into their custody, is at liberty, at any time, to alter its destination, or resume the custody of it, unless indeed it had been packed with other merchandise where it could not be removed, without unreasonable expense; and the station agent, who receives the goods or baggage, is competent to bind the company, by receiving a countermand, or new directions, to which he assents,[3] as being in the line of his employment. His assent and promise to execute the order, may be regarded as evidence tending to show that the order was given to the proper person.

4. But where an agent of a railway company assumes to make a contract, in relation to the business of the company beyond the line of his ordinary employment, and especially where it is in contravention of the common course of the business of the company, or of their published rules and regulations, it will not bind the company.[4] Thus it was held that a surgeon, who amputated the

v. Hudson River Railw., 5 Duer, 55. It is often said that Railway companies are responsible for the careless and negligent acts, but not for the wilful and criminal acts of their agents. De Camp *v.* Miss. & Mo. Railway. Co., 12 Iowa, 348. But the true inquiry is whether the agent was acting within the scope of his employment. If so his acts bind the company, whether wilful or negligent.

[3] Same case, where *Martin*, B., said: "A carrier is employed, as bailee of another's goods, to obey his directions concerning them; and I have no hesitation in saying, that generally, at any period of the transit, he may have them back. I think that if a traveller by railway is dissatisfied with his mode of travelling, he may at any point stop and require that his luggage should be delivered up to him.

"The station clerk had power to receive the countermand; and a loss having ensued from an omission to comply with that countermand, the defendants are bound to make that loss good."

So also where goods, carried by one company, arrived at the station of another company, the place of their destination, but that company refused to deliver them to the owner, he offering to pay all charges, on the ground that their contract with the other company, to deliver goods for them, did not include this class, being timber, and that they should therefore require the goods to be taken back upon the line of the other company, it was held to be a conversion. Rooke *v.* Midland Railw., 16 Jur. 1069; s. c. 14 Eng. L. & Eq. 175.

[4] Elkins *v.* Boston & Maine Railw., 3 Foster, 275. In this case the ticket-master and station agent of defendants received some parcels of goods of the plaintiff, and promised to forward them by the next passenger train, and the goods were lost. The plaintiff proved that in two instances, in the two years preceding, goods had been forwarded by the passenger trains, under the charge of some of defendants' servants, but it did not appear that freight was paid the

limb of a passenger, who was injured by the moving of a truck upon the railway, and the station agent had directed that "every attention" should be paid to such person, in consequence of which the surgeon performed the operation, could not recover of the company for his services, on the ground that it was not incident to the employment of such agent to bind the company by such contract.[5]

5. But the fact that the company had ratified similar contracts, made by this same agent, might be evidence tending to show, that they had given this particular servant authority to make such, or similar contracts, but not that they had given authority to all their servants to do so.[5]

6. If the company give notice that they will not be bound by the delivery of goods, "unless they were signed for by their clerks or agents," and this is known to the plaintiff, the company are not bound by a delivery in a different mode.[6] But where the general freight agent was, by the by-laws of the company, intrusted with the power to negotiate contracts for the transportation of freight, with the approval of the president, it was held that this imported nothing more than that the president of the company might interfere to control the agent in making contracts, whenever he chose, but that unless he did so interfere, and neglected to apprise the public that all contracts for the transportation of freight must be ratified by him, the company would be bound by the acts of the agent.[7]

company, or that they in any other way assented to it. See also Norwich & Worcester Railw. *v.* Cahill, 18 Conn. 484, where it is held the declaration of a director is good evidence of contract to bind the company. But testimony of this character is of almost infinite variety, in regard to its force and effect, and much of it, as in the case first cited in this note, is too remote to be much ground of reliance. To bind the company, the testimony should show a usage or continuous practice.

[5] Cox *v.* Midland Counties Railw., 3 Exch. 268; Stephenson *v.* N. Y. & Harlem Railw., 2 Duer, 341.

[6] Slim *v.* Great N. Railw., 14 C. B. 647; s. c. 26 Eng. L. & Eq. 297. The authority of the agent to bind the carrier is always a question of fact, dependent upon the attending circumstances and the course of business. Thomson *v.* Wells, 18 Barb. 500.

[7] Medbury *v.* New York & Erie Railw., 26 Barb. 564. The company's agents cannot make admissions affecting its interests, except during the progress of their acts and as part of the transaction. Fletcher *v.* Boston & Maine Railw., 1 Allen, 9. So also of an agent along the line of a railway as a night-watch, who, some

7 But where trees were carried upon the company's trains, and the owner obtained leave to set them temporarily in the company's grounds, by permission of the station clerk, or of the general superintendent of the company, and both these persons subsequently refused to let the owner take them away, whereupon he applied to the managing director of the company, who also refused, and he brought trover against the company, the Court of Exchequer Chamber held it would lie.[8] But where the servant of the company arrests a passenger for not paying fare, the company are not liable.[9]

8. And it makes no difference, in regard to binding the company, that the agent disobeyed the direction of his superior, if he was acting within the scope of his employment at the time.[10]

9. And in the case of a common carrier of goods, he is liable for the acts of all the servants of his sub-contractor.[11]

10. And it will make no difference in regard to the responsibility of the carrier for the acts of his servants, that the emoluments derived from the particular transportation were, by arrangement

days after cattle had been delayed, said he had forgotten the cattle, it was held not binding upon the company, and upon most unquestionable grounds. Great Western Railw. *v.* Willis, 18 C. B. (N. S.) 748.

[8] Taff Vale Railw. *v.* Giles, 2 El. & Bl. 822; s. c. 22 Eng. L. & Eq. 202. The court say, "It is the duty of the company to have some person clothed with discretion, to meet any exigency that may arise, and to grant any reasonable demand."

[9] Eastern Counties Railw. *v.* Broom, 6 Exch. 314; s. c. 6 Railw. C. 743; Roe *v.* Birkenhead Railw., 7 Exch. 36; s. c. 6 Railw. C. 795.

[10] Philadelphia & R. Railw. *v.* Derby, 14 How. (U. S.) 468, 483. Nor will it excuse the company from liability because the disregard of duty on the part of the agent was wilful. Weed *v.* Panama Railw., 5 Duer, 193. So where a clerk having charge of the receiving of freight, at a wharf, informs the owner of goods, that one rate exists; when he had been instructed to demand a higher rate, for freight, it will bind the principal to the rate named. Winkfield *v.* Packington, 2 C. & P. 599.

[11] Machu *v.* The London & Southwestern Railw., 2 Exch. 415; s. c. 5 Railw. C. 302. This case was where the company employed an agent to deliver parcels in London. They had been accustomed to send a delivery ticket, with each parcel, which was headed with the name of the company, and signed by the party employed by them to make the delivery, and contained the names of the porters of that party, one of which porters stole the parcel in this case. Held, that such porter is to be regarded as the company's servant, within the Carriers' Act.

between the carrier and the servants, allowed to be retained by the servants, as part of their compensation; unless this were known to the owner of the goods and he contracts with the servants, as principals.[12]

11. The authority of the servants of a carrier is a question of fact to be determined by the jury, and the burden of proof rests upon the party claiming such authority.[13] A mere messenger having charge of property sent by express is not necessarily authorized to make contracts to receive freight.[12]

12. The owner of a vessel is not exonerated from responsibility for the acts of the master, on account of the existence of a charter-party, by which the charterers assume the responsibility of the voyage, so long as the owners remain in possession of the ship by their servants, the master and crew. And those who ship goods upon such vessel without knowing of the existence of the charter-party, may look to the owner to safely stow or pack the goods; and the fact that the charterers employed a stevedore to stow these particular goods will make no difference, the owner of the goods not being aware of such fact.[14]

SECTION XVII.

Limitation of Duty, by Course of Business.

1. *Carriers bound only to the extent of their usage, and course of business.*
2. *This question arises only when they refuse to carry.*
3. *Carriers and some others are bound to serve all who apply.*
4. *Duty under English Carriers' Act.*
5. *Usage to determine character of freight.*
6. *Carrier cannot transship freight except in cases of strict necessity.*
7. *Proof of the ordinary results of same voyage admissible.*
8. *So also is the notoriety of the usages of trade and business.*
9. *Owner of goods bound to remove them on arrival, or carrier only responsible for actual negligence.*
10. *How far carrier bound to observe the usages of the port.*

§ 183. 1. It seems to be an admitted principle in the law of carriers, that their obligations and duties may be restricted by the

[12] Bean *v.* Sturtevant, 8 N. H. 146. See Sheldon *v.* Robinson, 7 id. 157; McLane *v.* Sharpe, 2 Harrington, 481.

[13] Thurman *v.* Wells, 18 Barb. 500.

[14] Sandeman *v.* Scurr, Law Rep. 2 Q. B. 86. *Quære;* whether the charterers may not also be held responsible under the bills of lading signed by the master in furtherance of the charter-party.

course of their business. They may limit it to the carrying of particular commodities. The business of common carriers is not one imposed upon any particular person, natural or artificial, and any one may undertake it, at will, and by consequence may enter upon so much of the entire business as he chooses.[1] In the absence of any special contract, the obligation of a carrier of goods is to carry them by the usual route professed by him to the public, and to deliver them within a reasonable time.[2] And there is no obligation upon a railway company to carry goods otherwise than according to their public profession.[3]

2. But this distinction is of no practical importance, except where carriers refuse to carry certain kinds of goods, or to carry them except upon certain conditions excusing their general common-law responsibility, and suit is brought for the refusal. In such cases it is believed the carrier is not liable for an absolute refusal to carry goods wholly out of the range of his ordinary business, unless where the carrier is a corporation chartered, with the powers, and for the purpose, of becoming common carriers in general, and in such cases even, it seems the better opinion, that unless restrained by the express terms of their charter, such companies have the same liberty, as to the extent of their business, as natural persons.[4] In this last case the language of *Parke*, B., is pertinent. "The question is whether the defendants are, under the circumstances of this case, bound to carry coals from Milton to Oakham. If they are merely in the situation of carriers, at common law, they are not bound, for they have never professed to

[1] Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. 186. Opinion of *Daniel*, J., in N. J. Steam Navigation Co. *v.* Merchants' Bank, 6 How. (U. S.) 344. If any illustration or authority were needful upon this point, it might very readily occur to any one reflecting upon the subject. An express company are no doubt liable as common carriers, but are not compellable to carry such articles as are never expected to be sent or carried by express, as, for instance, articles of great bulk and weight. It would certainly be a novelty to require an express company to transport coal, salt, iron, and lead in pigs, &c.

But practically the increased price of this mode of transportation will protect the companies from these extraordinary demands, and they have the right also to demand the protection of the law as well as other persons from liability to such intrusion.

[2] Hales *v.* London & Northwestern Railw. Co., 4 B. & S. 66.

[3] Oxlade *v.* Northeastern Railw. Co., 15 C. B. (N. S.) 680.

[4] Johnston *v.* Midland Railw., 4 Exch. 367; s. c. 6 Railw. C. 61; Sewall *v.* Allen, 6 Wend. 335; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story, 16.

carry coals from or to those places. At common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." He then cites at length the words of *Holt*, Ch. J., in Lane *v.* Cotton, 12 Mod. 484, in regard to the general duty of all who undertake to serve the public in any particular business to serve all who come, citing the cases of blacksmiths,[5] innkeepers,[6] and common carriers.

3. In the case of an innkeeper there is no question that the action will lie. So also in the case of a carrier, and that arises from the public profession which he has made. A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places.

4. In regard to the effect of the act of Parliament, the learned judge says: "I think that no obligation is cast upon the company to undertake the duties of carriers altogether, and on every part of their line, but that they may carry some goods on one part of the line and not on others." That act in terms enabled that company to become carriers, but did not oblige them to do so. Hence it is said, "They are not bound to carry to or from each place on the line, or every description of goods."[7]

5. Evidence of the prevailing usage among manufacturers, deal-

[5] Keilway, 50, pl. 4, cited in note to Lane *v.* Cotton, 12 Mod. 484, and in note to Parsons *v.* Gingell, 4 C. B. 555.

[6] Dyer, 158, Godb. 346. But it seems to be conceded by the learned Baron here, that the instance which he cites of the smith being bound to shoe all the horses of the realm which come to him, is at least rendered questionable by the note to Parsons *v.* Gingell, 4 C. B. 545. And this liability to action for refusal to serve another in one's business, undoubtedly, is confined to carriers of goods and passengers, and innkeepers, in regard to which the learned judge insists there never was any question. Lane *v.* Cotton, 12 Mod. 472, 484.

[7] It is said there must be either a special contract or a general usage to carry the particular kind of goods, to render the party liable for not carrying. Tunnell *v.* Pettijohn, 2 Harr. 48; Bennett *v.* Dutton, 10 N. H. 481. But if the party undertake the carriage, although he had not been accustomed before to carry that kind of goods, he is liable, as a common carrier, if that is his general business, unless he make a special acceptance. See the cases cited above, and Powell *v.* Mills, 30 Miss. 231.

ers, and carriers, may be resorted to for the purpose of determining whether sawed marble, in slabs, is to be rated as unwrought marble.[8]

6. Carriers by steamboat are not justified in the transferment of freight except in cases of strict necessity, and if done except in such case, it will subject the carrier to responsibility for the subsequent loss of the freight upon the vessel to which it is transferred. The mere fact that a steamboat upon an inland river is grounded, from which she might relieve herself, with safety and convenience, by temporarily unlading a part of the cargo upon the shore, and then replacing it on board after the vessel was afloat, and thus completing the voyage, is no ground for the transshipment of the whole cargo.[9]

7. In the case of goods transported by sea, it has been held competent to prove the common result of transporting goods the same voyage, whether they usually arrive in a safe or damaged condition, as a ground of presumption of negligence, or the contrary.[10] But we should apprehend that, generally, it must be assumed that transportation by sea or land would not be undertaken or continued, unless, in the common run, the goods might be expected to reach their destination in safety. And unless protected by his own contract, the carrier would be responsible for all damage, whether with or without his fault.

8. In a recent English case, in regard to equality of charges on packed parcels, it became material to prove that the carriers had knowledge of the practice of sending packed parcels in bulk, and then distributing them upon arrival at their destination. The following question and answer were raised at the trial, and approved by the full bench: "Has this practice been notorious?" It was answered that, for the last forty years, it had been so general as to be notorious among carriers.[11]

9. There is no doubt the owner of goods consigned by railway is bound to take notice of the course of the business and call for them at the ordinary time of arrival,[12] and if he do not

[8] Bancroft *v.* Peters, 4 Mich. 619.

[9] Cox, Brainerd, & Co. *v.* Foscue, 37 Ala. 505.

[10] Steele *v.* Townsend, 37 Ala. 247.

[11] Sutton *v.* Southeastern Railw. Co., 11 Jur. (N. S.) 935. It was decided in this case that the court will not grant an injunction before trial to restrain an overcharge by a railway company for packed parcels.

[12] Blumenthal *v.* Brainerd, 38 Vt. 402.

remove them on arrival, or within a reasonable time thereafter, the company will only be responsible for ordinary neglect, and on proof of the goods being stolen, but with no evidence of want of ordinary care, the plaintiff cannot recover, and it is not error for the judge to direct a verdict for the defendant.[13]

10. But the usages of a particular port, as to the manner of landing goods, it has been held, is not binding upon shippers from another port, unless known to them, or in some way presumptively assented to.[14] But it is said in Farmers' and Mechanics' Bank *v.* Champlain Transportation Co.,[15] "the course of business at the place of destination, the usage or practice of the defendants and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself." And we apprehend that every one in sending goods from one port or place to another, expects to be bound by the usages of the place of destination and the general practice of the carriers there. But where these are in contravention of the common and general usages of the business, it should very clearly appear that they exist, and are of uniform observance, and not unreasonable in character,[16] and that they were known, or might and ought to have been known, to the carrier.

SECTION XVIII.

Strangers Bound by Course of Business and Usages of Trade.

1. *Those who employ railway companies bound to know the manner of transacting their business.*
2. *General usages of trade presumed to be familiar to all.*
3. *Contracts for transportation contain, by implication, known usages of the business.*

§ 184. 1. Questions of some difficulty often arise in regard to the effect of usage in the carrying business. If it is understood, as applicable to railways, as synonymous with the general course of transacting the business of carriers, by railway companies, then those who employ them are undoubtedly bound to take notice of it.[1]

[13] Lamb *v.* Western Railw., 7 Allen, 98.

[14] Steamboat Albatros *v.* Wayne, 16 Ohio, 513.

[15] 23 Vt. 186, 208.

[16] Dixon *v.* Dunham, 14 Ill. 324.

[1] St. John *v.* Van Santvoord, 25 Wend. 660; s. c. 6 Hill, 157. This case,

2. The usages of any particular trade, such as are uniform or general, are presumed to be familiar to all persons having transactions in that trade or business; and all parties making contracts upon any subject, leave to implication merely such incidents as are presumed to be familiar to both parties, and in regard to which there cannot ordinarily be any misunderstanding.

3. The same is eminently true of the carrying business, upon the great thoroughfares of the country. Contracts are made, by way of memorandum merely; and to a jury, who know nothing of

perhaps, illustrates this subject about as well as any one. In the Supreme Court it was considered that had the owners of the goods known that defendant was not a carrier beyond Albany, he would only have been bound to the end of his route; but as this was not known to the owners, and defendants gave a general receipt, describing the box by its mark, "J. Petrie, Little Falls, Herkimer Co.," the plaintiffs were at liberty to infer they were carriers to that point, and therefore they were responsible for its safe delivery at its destination.

This decision was reversed in the Court of Errors; and Chancellor *Walworth*, delivering the leading opinion, said: "If the owner of the goods neglects to make the necessary inquiry as to the usage and custom of the business, or to give directions as to the disposal of the goods, it is his own fault, and the loss, if any, after the carrier has performed his duty, according to the ordinary course of his trade and business, should fall upon such owner, and not upon the common carrier."

The Chancellor argues further, that, from the circumstances, the plaintiffs had no right to expect a personal delivery by the defendant, and therefore the law did not require it. In the case of Gibson *v.* Culver, 17 Wend. 305, Justice *Cowen* seems to suppose that the carrier by stage-coach is, in the first instance, bound to personal delivery, and that, in order to exonerate himself from that obligation, he must show a custom or usage of such notoriety as to justify the jury in finding that it was known to the plaintiffs, in order to excuse the carriers.

But it should be noted that this was as far as it was necessary to go in this case in order to excuse the carrier, and it is therefore not certain how far the court might have gone here if the facts had required it. For in 6 Hill, 158, this view is altogether repudiated, and the more rational one adopted, that if one is ignorant of the course of business on the route, he is bound to make inquiry, and cannot make a contract, with his eyes closed, and thereby impose a greater obligation upon the other party, in consequence of his own voluntary want of comprehension.

See also the opinion of the court in F. & M. Bank *v.* Ch. T. Co., 23 Vt. 211, 212. In Cooper *v.* Berry, 21 Ga. 526, it is said that usage may be resorted to for the purpose of showing that common carriers of certain goods are only subject to a modified responsibility in regard to their preservation, it having been the uniform practice for the carriers to except, in their bills of lading, all losses by fire, and this being known to the owners or their agents.

the usages and course of business in such transactions, would be quite unintelligible, and could only be made to express the real purpose of the parties in connection with such usages and course of business as is presumed to be in the minds of the parties at the time of entering into the contract. And if one of the parties assumes to transact any business, in ignorance of the very elementary usages of such business, he is not allowed to gain an unjust advantage of the other party by means of his own voluntary or rash ignorance, nor is the other party at liberty to take advantage of such ignorance and inexperience (when made known to him) to induce such inexperienced one to assume an unequal risk on his part. But where the usage or custom is resorted to for the purpose of controlling the general principles and obligations of the law of contract, there is no doubt of the necessity of showing its notoriety, as well as its reasonableness and justice. The latter qualities are generally supposed to be sufficiently shown by the general acquiescence of the public in the usage. But where the complaint against the carrier was for not delivering cotton in good condition, a plea that it was the custom known to the plaintiff to transport cotton and other freight between the points named in the bill of lading, in open boats, and that all the damage which the cotton sustained was caused by the rains which fell during the voyage, was held good on demurrer.[2]

[2] Chevaillier *v.* Patton, 10 Texas, 344. Where cotton is shipped through an agent, for that purpose, he is authorized to bind his principal according to law. In the absence of proof to the contrary, the general law of common carriers is the power under which the agent acts. If a usage be sufficiently established, that will govern, because it is presumed to be known to the parties. And this presumption is conclusive upon the principal, whether it is known to the agent or not. But a custom known only to the agent, and which is not so established as to change the law of the contract, will not bind the principal.

By way of establishing a usage in shipping upon a particular river, it is competent for a witness to testify as to what has been his habit and custom in shipping on all the boats of said river, as well as on the particular boat upon which the loss occurred, which is the subject-matter of controversy. To make a usage good, it must be known, certain, uniform, reasonable, and not contrary to law. And if boats on a certain river, or a certain boat on that river, gave sometimes bills of lading containing an exemption from loss by fire, and at other times bills of lading containing no such exemption, then no such usage is established for want of uniformity. And even if, in a majority of cases, bills of lading contain such clauses of exemption, still the usage is not sufficiently proved to make it the law of the contract between the parties. Berry *v.* Cooper *et als.*, Ex'rs., 28 Ga. 543.

SECTION XIX.

Cases where the Carrier is not Liable for Gross Negligence.

1. *Extent of English Carriers' Act.*
2. *Must give specification, and pay insurance.*
3. *Loss by felony of servants excepted. But not liable unless by carrier's fault.*
4. *Not liable in such case, where the consignor uses disguise in packing.*
5. *Carrier is entitled to have an explicit declaration of contents.*
6. *But refusal to declare contents will not excuse the carrier for refusal to carry.*
7. *This statute does not excuse carrier for delay in the delivery.*
8. *Disposition in English courts to hold carriers to more strict accountability.*

§ 185. 1. Under the English Carriers' Act,[1] the carrier is not liable for the carriage of articles there enumerated, as "articles of great value in small compass," with certain specified ones, as "money, bills, notes, jewellery," &c., if the requisitions of the statute are not complied with, although the goods be lost through the gross negligence of the carrier or his servants.[2] It was said

[1] 1 Wm. IV. & 11 Geo. IV., c. 68. Looking-glasses being specified in the act, it was held to extend to a "large looking-glass." Owens *v.* Burnett, 2 Car. & Marsh. 357. Some other curious inquiries have arisen under this act, in regard to its extent. Thus the word "trinkets," used in the act, was held not to comprehend an eye-glass with a gold chain attached. Davey *v.* Mason, 1 Car. & Marsh. 45. And also that "silks" does not include silk dresses, made up for wearing. Ib. Hat bodies, made partly of wool and partly of fur, are not "furs." Mayhew *v.* Nelson, 6 Car. & P. 58. So, too, a bill of exchange, accepted blank, and sent to the party for whose benefit it was accepted, and who was expected to sign it, as drawer, and which was lost before it reached its destination, is not a bill or note, within the act.

[2] Hinton *v.* Dibbin, 2 Q. B. 646. Lord *Denman*, Ch. J., here said: "The question for our decision is, whether, since the passing of the said act, a carrier is liable for the loss of goods, therein specified, by reason of gross negligence. . . . In putting an interpretation upon this statute, for the first time, we necessarily feel the case to be one of considerable importance, both because it is the first, and also because it regards a subject upon which much doubt and uncertainty have existed, making it expedient, therefore, that the question should be finally settled. In deciding upon this statute, we must of course be regulated by its language; and the state of the law at the time of its passing is material only so far as it enables us to discover the mischief for which it was intended to apply a remedy. It is then enacted that no such common carrier shall be liable for the loss of or injury to any property therein specified (including silks) above the value of £10, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such carrier, or to his servant, for the purpose of being

in a recent case, where the construction of this act came in question,[3] that it is impossible, with precise accuracy, to define what are "trinkets" within the meaning of the act. But as the closest approximation to this, it was said that they must be articles of mere ornament, or if ornament and utility be combined, the former must be the predominant quality. And as instances, it was said bracelets, shirt-pins, rings, brooches, and ornamented shell and tortoise-shell portmonnaies, however small their intrinsic value,

carried, the value and nature of such property shall have been declared, and such increased charge as thereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such property. By the first section, therefore, thus briefly abstracted, the exemption of the carrier from liability is absolute and complete, unless the preliminary thereby made indispensable is complied with by the owner of the goods. The increased charge is, by the second section, declared to be what the carrier is entitled to receive over and above the ordinary rate of carriage for the conveyance of the species of property before enumerated, when above £10; such increased rate of charge to be notified by some notice to be affixed in some conspicuous part of the office, warehouse, or receiving-house where goods are received for carriage. By section 4, it is provided, that no public notice or declaration shall exempt any carrier from his liability at common law for the loss of or injury to any articles other than those in the first section enumerated, but that, as to such other articles, his liability, as at common law, shall remain notwithstanding such notice. From which exception, as to the liability of the carrier in respect of goods not enumerated, it seems impliedly to follow, that as to those which are, protection is afforded to him in the manner above set forth. By section 8, it is enacted, that nothing in this act shall be deemed to protect such carrier from the felonious acts of any servant in his employ, nor to protect such servant from liability for any loss or injury by his own personal neglect or misconduct. The former branch of the clause is, to say no more, at least consistent with the supposition that for conduct short of felony the carrier is no longer liable; whereas it is obvious that, before the passing of the act, the carrier would have been liable for acts of the servant not amounting or approaching to felony — negligence. The latter branch seems to have been introduced *ex abundanti cautela* merely, seeing that there is nothing in any part of the act to vary the liability of the servant to the master for any misconduct of the former.

"Upon the whole, the language of the first section seems to us to be perfectly clear and unambiguous without exception or restriction, and that none can fairly be implied from any other part of the act. By holding the carrier exempt from liability as to the enumerated articles, unless the owner shall declare their nature, and pay for them in the manner prescribed, we not only further the object avowed in the title and preamble of the act, but give it the effect of removing doubts and difficulties which (as we have seen) it is admitted did exist as to the liability of a carrier for the loss of goods who has sought to limit that liability by the publication of a notice in the usual form."

[3] Bernstein *v.* Baxendale, 6 C. B. (N. S.) 251.

are trinkets. So silk watch-guards were held to be silk in a manufactured state; and smelling-bottles and the like, are glass within the act.

2. The act contains an exception of loss caused by the felony of the carrier's servants. The condition upon which, in all other cases, the carrier is to be made liable for carrying the articles enumerated, is, that at the time of the delivery of the articles the owner, or his agent, make a declaration of the nature and value of the goods, and pay or agree to pay, any increased rate of charge which the general regulations of the carrier may require.

3. In regard to the liability of the carrier for loss by the felony of his servants, it was held, that when the carrier was not notified of the contents of the parcels, as, by the act, he was entitled to be, it was only the liability of an ordinary bailee for hire.[4] And the mere fact of loss, by the felony of a servant, is not *prima facie* evidence of negligence in a bailee for hire.[5]

4. And where the carrier uses artifice to disguise the valuable contents of the parcel, as where two hundred sovereigns were enclosed in six pounds of tea, and they were stolen by the carrier's servants, it was held the carrier was not liable, the owner having virtually contributed to his own loss.[6]

5. Under this act the carrier is entitled to have an express declaration from the owner, or his agent, of the contents of a box, whenever it is delivered, however obvious to conjecture the nature of the contents may be.[7]

[4] Butt *v.* Great Western Railw., 11 C. B. 140; s. c. 7 Eng. L. & Eq. 443. In the case of The Great Western Railw. *v.* Rimel, 6 C. B. (N. S.) 917, it is said a carrier is not liable for the felonious act of his servants without gross negligence, but felony in his servants is alone a good answer to a defence by him under the Carriers' Act.

[5] Finucane *v.* Small, 1 Esp. 315. "To support an action of this nature, positive negligence must be proved," per Lord *Kenyon*, Ch. J. There should be proof of the loss being by the felony of the company's servants, and that it was not committed by others. Metcalf *v.* London and Brighton Railw., 4 C. B. (N. S.) 307.

[6] Bradley *v.* Waterhouse, Moody & M. 154; s. c. 3 C. & P. 318.

[7] Boys *v.* Pink, 8 C. & P. 361. And in Baxendale *v.* Hart, 6 Exch. 769; s. c. 9 Eng. L. & Eq. 505, in error, reversing the judgment below, the court say: "We think that the act of parliament requires the person who sends the goods to take the first step by giving that information to the carrier which he alone can give, and that if the sender does not take that first step, then he cannot maintain this action by the force of the first section, which expressly says, that

6. But it seems that the refusal to declare the contents of a parcel, will not justify the carrier in refusing to carry it, but only excuses the loss.[8]

7. In a late case,[9] it was held, that the exemption of the carrier under this act had reference exclusively to a "loss," of the article "by the carrier," such as by the abstraction by a stranger, or by his own servants, not amounting to a felonious act, or by the carrier or his servants losing them from vehicles in the course of carriage, or by mislaying them, so that it was not known where to find them when they ought to be delivered, and that it does not extend to any loss of any description whatever, occasioned to the owner of the article, by the non-delivery or by the delay of the delivery of it, by the neglect of the carrier or his servants.[10]

the carrier shall not be liable unless the declaration is made. Such declaration, when made, will lead to other consequences; the carrier will know what he is to have more, according to the tariff which he has stuck up in his office; if that sum is paid and the goods are lost, then of course he would be liable; on the other hand, if he refuses to give a receipt as provided by the statute, or has omitted to comply with any provision of that kind on his part to be performed, he would lose the protection given by the act."

[8] Pianciani *v.* London & S. Railw., 18 C. B. 226; s. c. 36 Eng. L. & Eq. 418; Crouch *v.* London & N. W. Railw., 14 C. B. 255; s. c. 25 Eng. L. & Eq. 287.

[9] Hearn *v.* London & S. W. Railw., 29 Eng. L. & Eq. 494.

[10] *Ante*, §§ 178, 179, 180, and cases cited. The statute now in regard to freight generally refers the terms of special contracts to the court, as to their reasonableness.

In Simons *v.* The Great Western Railw. Co., 18 C. B. 805; s. c. 37 Eng. L. & Eq. 286, it was held that the 7th section of the Railway and Traffic Act, 1854, 17 & 18 Vict. c. 31, does not prevent a railway company from making a special contract as to the terms upon which they will carry goods, provided such contract be "just and reasonable," and signed by the party sending the goods.

And it is for the court to say, upon the whole matter brought before them, whether or not the "condition" or "special contract" is just and reasonable.

A condition, that the company will not be accountable for the loss, detention, or damage of any package insufficiently or improperly packed, — Held, unjust and unreasonable. *Semble*, that a condition "that no claim for damage will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered," is just and reasonable.

A condition, that in the case of goods conveyed at special or mileage rate, the company will not be responsible for any loss or damage, however caused, is just and reasonable.

And in The London & Northwest Railw. Co., Appellants, *v.* Robert Clarke Dunham, Respondent, 18 C. B. 826, which was a case sent by a county court

8. The last case cited is certainly not a little of a manifestation of a disposition, in the English courts to restore, as far as prac-

judge for the opinion of the Court of Common Pleas, it was stated that goods were received by the defendants, a railway company, under the following note, signed by the plaintiff: "Risk note. London & Northwestern Railw. Company, Park Lane Station, Dec. 19, 1855. Hay, straw, furniture, glass, marble, china, castings, and other brittle and hazardous articles, &c., conveyed at the risk of the owners. — Delivered to London and Northwestern Railw. Company, from R. C. Dunham (the plaintiff), 3 crates beef, for F. C. Duckworth, Newgate Market, to be forwarded from Liverpool to London at owner's risk," — it was held that the court could not, from this statement, judge whether or not the condition was "just and reasonable" within the 17 & 18 Vict. c. 31, § 7.

Jervis, Ch. J., in delivering the opinion of the court, in both cases, said: "The result seems to be this, — a general notice is void; but the company may make special contracts with their customers, provided they are just and reasonable, and signed; and whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security, that the court shall see that the condition, or special contract, is 'just and reasonable.'

"Applying that rule to the case of Simons *v.* The Great Western Railw. Co., I think the matter is sufficiently brought before the court to enable us to decide it, and that the fourth plea, which states that the goods were received by the company to be carried at a certain special mileage rate, and under and subject to a special contract (referring to the 15th article of the conditions set out in the replication), is a good plea. As to the third plea, I think that is a bad one, inasmuch as it seeks to relieve the company from the consequences of the loss or non-delivery of the goods by reason of insufficient or improper package, which, in my judgment, is not reasonable as a ground of relief. I think the court is bound to look at the particular matter in each case, to see whether the condition is just and reasonable or not.

"As to the case of The Great Western Railw. Company, Appellant, *v.* Dunham, Respondent, the same reasons to a certain extent will apply. In order to see whether or not the contract be just or reasonable, it is necessary that we should be furnished with proper materials. The judge of the county court has referred it to us to say whether or not the conditions contained in the 'risk note,' limiting the liability of the company, were unjust and unreasonable, without telling us the circumstances under which the contract was made, or what is the nature or the reason of the particular risk. I therefore think enough is not disclosed to enable us to come to any conclusion as to whether or not the contract or condition is just and reasonable.

"For these reasons I think that in the first case our judgment ought to be for the plaintiff, upon the issue in law raised upon the third plea, and for the defendants as to the fourth plea; and that the second case must go back for the purpose of being more fully stated."

So that now, by this late statute, the law of that country is brought back nearly to its original starting-point. Mere general notices in regard to the liability of carriers are of no avail, unless reduced to the form of special stipulations

ticable, the reasonable responsibility of carriers, which under the former decisions, with reference to notices and special contracts, had become uncertain and somewhat problematical.[10]

in regard to the liability of the carrier, and signed by the party sending the goods, and unless, in the opinion of the court before whom the case shall be tried, they are "just and reasonable."

This act, it is specially provided, shall not affect the Carriers' Act, or any liability under it. But in a late case in the Common Bench it was held, that where the carrier in the bill of lading expressly excepted losses from "leakage and breakage," this exception did not extend to such losses which occurred from his own negligence, but only such as occurred without his fault. Phillips *v.* Clark, 2 C. B. (N. S.) 156.

And where the railway company received cattle for carriage on the express terms, in writing, signed by the owner, that they were to be held free from all risk and responsibility in respect of any loss or damage to cattle, arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire, or any other cause whatsoever, it was held to be a reasonable condition within the Railway and Canal Traffic Act, 1854.

And it was said that this protected the company from liability for the loss of cattle by suffocation during the journey, occasioned by the negligence of company's servants. But it was further said, that the facts of this case did not tend to show negligence in the company's servants, the plaintiffs being permitted to send, free of expense, a person who had the oversight of the cattle, and who made no complaint of the sufficiency and safety of the arrangements for transportation. *Alderson*, B., said, "I think the negligence was really that of the servants of the plaintiff, and that the defendants are not liable on that ground." Pardington *v.* South Wales Railw., 1 H. & N. 392; s. c. 38 Eng. L. & Eq. 432. In Betts *v.* Farmers' Loan & Trust Co., 21 Wisc. 80, it was held that common carriers may contract with the owner of live stock that he shall assume all risk of damage, from whatever cause, in the course of transportation.

SECTION XX.

Goods of Dangerous Quality. — Internal Decay. — Bad Package. — Stoppage in Transitu. — Claim by Superior Right.

1. *Internal decay. Defective package.*
2. *Dangerous commodities must be so reported.*
3. *Carrier not responsible for natural decay or leakage.*
4. *The owner must bear the loss from dampness of the hold, as one of the accidents of navigation, if excepted from the risk and no fault of the carrier. Carrying salt. Effect of bill of lading, stating goods in good order.*
5. *Owner responsible for loss from defects in article. Duty of carrier after vessel stranded.*
6. *The carrier not responsible except for damages caused by delay, where the owner selects his own carriage and loads it.*
7. *The carrier must do all in his power to arrest incipient losses.*
8. *Right to stop* in transitu.
9. *Carrier liable, if he do not surrender the goods, to one having right to stop* in transitu.
10. *Carrier may detain until right is determined.*
11. *Right exists as long as the goods are under control of carrier.*
12. *Most uncertainty exists in regard to capacity of intermediate consignees.*
13. *As long as goods are in the hands of mere carriers, right exists, but not when they reach the hands of the consignee's agent for another purpose.*
14. *Company compellable to solve question of claimant's right, at their peril.*
15. *Conflicting claims of this kind may be determined, by replevin, or interpleader.*
16. *Or the carrier may deliver the goods to rightful claimant, and defend against bailor.*

§ 186. 1. In addition to the general exceptions which the law makes to the liability of carriers, of losses from inevitable accident, and the public enemy, there are some others more or less connected with those which it may be proper to mention. Losses from natural causes, such as frost,[1] fermentation,[2] evaporation,[2] or

[1] *Ante*, § 167, and note 9.

[2] Buller's N. P. 69; 3 Kent, Comm. 299, 300, 301; Story on Bailm., § 492 *a*; Warden *v.* Greer, 6 Watts, 424; Powell *v.* Mills, 37 Miss. 691.

It has been considered, that where molasses in a cask of large dimensions was found to have lost, by leakage, through the pressure of the weight of the cask upon the bilge of the staves, the cask being admitted to be of sufficient strength for ordinary transportation, but the road being rough at the time by reason of frost, it did not remain firm on account of not being placed upon supports so as to divide the pressure upon the cask more equally, that the carrier was liable for the loss. Stocker & White *v.* Sullivan Railw., Special Reference; Angell on Carriers, §§ 210, 211, 212. Mr. Walford cites a number of cases, pp. 315, 316, illustrating the subject of this note, from the recent *Nisi Prius* trials.

The company are not liable for an accident arising from the viciousness or

natural decay of perishable articles,[2] the carrier exercising all reasonable care to preserve them,[2] and from the natural and

want of temper of an animal sent by their railway. Walker *v.* London & Southwestern Railw. (1843), or from the natural propensity of the animals. Clarke *v.* Rochester & Syracuse Railw., 4 Kernan, 570. The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition, and the question, what was the cause of the injury, is one of fact for the jury. Hall & Co. *v.* Renfro, 3 Met. (Ky.) 51. But in such cases the carrier is liable for any injury which might be prevented by the utmost foresight, vigilance, and care. Ib.; Conger *v.* Hudson River Railw., 6 Duer, 375. So also from injuries to merchandise from bad package. Norman *v.* London & Brighton Railw. (1843). So also for leakage by reason of bad package. Lucas *v.* Birmingham & Gloucester Railw. (1842). So also where goods are unreasonably exposed to fire for want of proper covering. Rutley *v.* Southeastern Railw. (1845).

And where the owner put several packages, one of flutes, one of watches, &c., into the same bag and sent them by railway, and the flutes were injured, it was left to the jury to say whether the accident was attributable to the carelessness of the company, or whether the plaintiff, by his own improper proceeding, contributed to the disaster, the mode of packing having thrown upon the company a more onerous task than if they had received the articles separately. Smith *v.* London & Birmingham Railw. (1845).

But the consignee of goods well packed is not obliged to accept of a remnant of them in a loose, unpacked state. Ch. & Rock Is. Railw. *v.* Warren, 16 Ill. 502. And in a recent trial at *Nisi Prius*, before Mr. Justice *Woodward*, of the Pennsylvania Supreme Court, Ritz & Pringle *v.* Penn. Central Railw., 10 Am. Railw. Times, No. 14, where the defendants claimed to excuse themselves from liability for injury to sheep transported on their cars, by reason of too many being put into a car, on the ground that this was done by the agents of the consignor, the agents of the company telling them to exercise their own judgment in regard to the number they would put into each car, the learned judge told the jury that the company could not, in that manner, shift the responsibility which the law imposed upon them. The remarks of the judge in his charge to the jury are marked by a proper regard to the interests of all concerned, and will, we trust, meet with general approval. "In my judgment this is no defence. They were bound to superintend the loading of the sheep. The cars belong to the company, and are, and ought to be, under the exclusive control of the company's agents. They are presumed to know better than freighters and drovers how many tons' weight, or how many animals each car can carry safely, and it is due, alike to the comfort of the dumb beasts, and to the interest of all concerned in the transportation, that the skill and experience of the agents in charge should dictate every thing that pertains to the taking or carrying and discharging the load. The less inexperienced persons have to do with these matters the better, and to turn such duties over to them is negligence on the part of the company's agents. They have storehouses in which to receive and load goods, and the shipping merchant is never expected or permitted to direct how many cars shall be employed in the transportation of his wares, nor what quantity shall go in each car. In like manner, the company is provided with cattle-yards and pens into

necessary wear by careful transportation,[2] in the mode to which the carrier is accustomed; or from the defective nature of the vessels or packages in which the things are put, by the owner or consignor, the former class being regarded as the act of God, and the latter the fault of the party, will excuse the carrier. Where the bill of lading contained in the margin the words "not accountable for leakage or breakage," the goods being casks of wine, it was held not to exempt the carrier from the ordinary condition of due care in the stowage of the casks. The different degrees of negligence are here thus defined: "Gross negligence is used to describe the sort of negligence for which a gratuitous bailee is

which they receive live stock, and their duties as common carriers attach from the moment they take possession of the stock. They may call on the owner or his servants to assist in loading the live stock, nay, they may require them to do all the manual labor, as best acquainted with the disposition and habits of the beasts, but it must be done under the practised eye of the company's agent, whose duty it is to see that the car is roadworthy, and that it is properly loaded. He may no more resign this duty to the drover than to the freighting merchant, and may no more neglect this duty than any other connected with the transportation. If, therefore, the jury believe that Boyle stood by and permitted the cars to be overloaded, whereby the sheep were injured, the company is liable for the consequences of his negligence."

The same principle is reaffirmed in Powell *v.* Penn. Railw. Co., 7 Law Reg. 348; s. c. 32 Penn. St. 414, by the same learned judge. It was here decided that where the agents, or servants of a common carrier, having charge of that portion of the business, suffer the shipper of live stock to put straw into a car, although under protest that if he do so it must be at his own risk, and the straw is fired and damage done to the animals, being horses in this instance, this constitutes negligence in the carrier, and he is liable to respond in damages, notwithstanding the shipper signed a release from all claim to damages to such stock while in the company's cars. And where in such case the court are requested to charge the jury, that if there was liability to fire from the locomotive communicating with the straw, and the fire was so communicated, and the damage ensued in consequence, it is negligence, and the company is liable, it is error to refuse compliance with the request. *Woodward*, J.

But where the owners of freight hire cars, load them as they choose, and are told that they load at their own risk, the company is not responsible for damages occasioned by injudicious loading, or for any loss resulting from the inherent defects of the article causing its destruction, or for decrease in the weight of live stock, arising from the mode of transportation, but are liable if any loss be caused or increased by their own want of care and watchfulness. Ohio & Mis. Railw. *v.* Dunbar, 20 Ill. 623.

And a carrier is not responsible for leakage arising from an imperfection in the bung of a cask intrusted to him to be carried, and not caused or increased by any negligence on his part. Hudson *v.* Baxendale, 2 H. & N. 575.

liable; but it is not properly applicable to an unskilled person who does not use skill, but only where a skilful person does not use the skill he has." The subject of the proper distinction between the different degrees of negligence is here discussed, and the cases commented upon at much length.[3]

2. Questions of some difficulty often arise in regard to the dangerous quality of the articles delivered to carriers for transportation, and the consequent duty of the owner of the goods. It would seem to be reasonable in such cases, and such seems to be the course of the decisions, that the owner shall inform the carrier of the character of the goods, whenever that is essential to be known, either on account of carrying the particular goods safely, or of carrying them in such a manner that other goods may not be damaged by coming in contact with them, and that for any default in this particular the owner is responsible, not only to the extent of any damage accruing to the goods, but even beyond that.[4]

3. And the carrier is not responsible for the decay of perishable articles, without his fault, even where he is driven by stress of weather, out of the direct course, into a strange port for repairs, whereby the injury is caused, or increased.[5] Nor is he responsible for leakage through the nature of the article or the defect of the casks, without fault on his part. The owner of articles subject to such contingencies, in hot weather and warm climates, as lard for instance, assumes all such risks as necessarily, or ordinarily, attend similar shipments, where they occur without the fault of the carrier.[6]

[3] Phillips *v.* Clark, 5 C. B. (N. S.) 882. See also Briggs *v.* Taylor, 28 Vt. 180. And where one delivers goods of a dangerous character, such as oil of vitriol, to a carrier without disclosing its dangerous quality, he will not be liable to a statutory penalty, unless himself aware of the contents, but he may nevertheless be responsible to the company for all damage in consequence in a civil action, since one who delivers such a parcel must be presumed to be aware of its contents so far as civil responsibility for consequences is concerned. Harne *v.* Garton, 5 Jur. (N. S.) 648; s. c. 2 El. & Bl. 66. So also where one allowed a servant of the carrier to take a carboy of oil of vitriol from his cart without making him understand the dangerous qualities of the article, only saying it contained acid, and the servant was seriously injured by the bursting of the carboy while carrying it upon his back, the owner was held liable to the servant in an action for the damages sustained. Farrant *v.* Barnes, 11 C. B. (N. S.) 553; 8 Jur. (N. S.) 868.

[4] Hutchinson *v.* Guion, 5 C. B. (N. S.) 149; *supra*, n. 3.

[5] The Brig Collenberg, 1 Black (U. S.), 170.

[6] Nelson *v.* Woodruff, 1 Black (U. S.), 156.

4. And damage done to cotton thread by reason of the dampness of the hold, not occasioned by any fault of the carrier, is an accident of navigation within that exception in the bill of lading, and the shipper must bear the loss resulting from such accidents, unless he can show that the negligence of the master, or mariners, made it operative on his goods.[7] As the taking of salt as part of the cargo of a general ship is common and allowable, the owners of other goods, liable to be injured thereby, must bear the resulting loss, if there was no bad stowage and no inquiry made by the shipper in regard to it.[7] The declaration in the bill of lading, that the goods are "shipped in good order, contents unknown," is only *prima facie* evidence of the goods being in such condition, at the time, as it must of necessity have reference only to the external appearance of the packages. And where proof is given tending to show such was not the fact, it casts the burden upon the owner, to prove the actual condition of the goods when shipped.[7]

5. The shipper is responsible for all losses resulting from the articles being in bad condition when shipped and perishing during the voyage without the fault of the carrier.[8] This was the case of a cargo of potatoes. The question of the responsibility of carriers by water is very carefully and learnedly examined by Mr. Justice *Clifford*, in the Propeller Niagara *v.* Cordes,[9] and the duty of the master to do all in his power to protect the goods on board, after the stranding of his vessel, very clearly stated.

6. It is the general duty of carriers to furnish safe and suitable carriages for the transportation, and to see that the articles are properly stowed therein. But where the owner makes his own selection of the carriage, knowing of the defects therein, and the carrier is bound to see that he does know thereof;[10] or where the shipper selects his own carriages and charters and loads them himself,[11] the carrier is not responsible for injuries resulting from defects in the carriages or loading. But in the former case, he is responsible for increased damage resulting from delay on the passage, beyond the ordinary time, and from not having the cattle on

[7] Clark *v.* Barnwell, 12 How. (U. S.) 272.
[8] Ship Howard *v.* Wissman, 18 How. (U. S.) 231.
[9] 21 How. (U. S.) 7.
[10] Harris *v.* Northern Indiana Railw., 20 N. Y. 232.
[11] East Tennessee, &c., Railw. *v.* Whittle, 27 Ga. 535.

board properly watered. And the owner of the cattle, in order to preserve his right of action against the carrier, is not bound to insist upon the cars proceeding, when ordered to wait for another train, or to insist upon attempting to water the cattle when told that the train might start before that could be done. He is justified in conforming to the directions of the conductor, and it is the duty of the latter to see that cattle on board are properly cared for.

7. It is the duty of a carrier to make all reasonable exertions to save an incipient damage to goods becoming more serious than is absolutely necessary, although he may not have been in fault on account of, or responsible for, its occurrence.[12] It is no excuse for the carrier, that, where the goods were injured by rain, in their passage to the defendant's wagon and office, they were not secured in cases or water-proof coverings.[13]

8. In regard to stoppage *in transitu*, it is a subject which in its general bearing does not properly come within the range of this work, but as it incidentally affects the rights of common carriers, in all modes, it may be useful to give here its general definition, and briefly point out the mode in which carriers are liable to be affected by the exercise of the right. Stoppage *in transitu* is the right which resides in the vendor of goods upon credit, to recall them upon discovering the insolvency of the vendee, before the goods have reached him, or any third party has acquired *bona fide* rights in them.[14] The carrier's interest in this question arises only when he is required by the vendor, while the goods are still in his possession, to redeliver them to him or some one on his account.

[12] Chouteaux *v.* Leech, 18 Penn. St. 224; Blooker *v.* Whittenberg, 12 La. Ann. 410.

[13] Klauber *v.* American Express Co., 21 Wis. 21.

[14] 2 Kent, Comm. 540, *et seq.*; Lickbarrow *v.* Mason, 1 Henry Black. 357; s. c. 6 East, 21; s. c. 2 T. R. 63; 1 Smith, L. C. 388 and notes, where the whole law upon the subject, both English and American, will be found. The right to stop goods *in transitu* is nothing more than the extension of the lien which the vendor has on all sales, for the price, until after delivery, to the very point of the goods coming to the actual custody of the vendee, or his agent. *Shaw*, Ch. J., in Rowley *v.* Bigelow, 12 Pick. 313.

This leading case establishes the point, that the vendee may defeat the right of the vendor to stop the goods *in transitu*, by a *bona fide* assignment of the bill of lading for value. And we are not aware that the right can be defeated in any other mode, until the goods come to the virtual possession of the vendee.

9. After such demand it becomes important to the carrier to determine whether the right to reclaim the goods still exists. For if so, and the carrier decline to redeliver them, or deliver them to the vendee, he and all persons claiming to retain them against the claim of the vendor, become liable in trover for their value.[15]

10. The principal difficulty which arises in such cases, so far as the carrier in concerned, will be likely to occur in regard to goods which have passed through one or more carrier's hands, before they come into those of the one upon whom the demand for the goods is made. For in the case of a single carrier, he may safely conclude that if such a demand is made upon him while the goods are in his custody, it will be prudent to retain them until the existence of the asserted right is established, and if so, to surrender them in obedience to the demand, as there can be no question of the right of the unpaid vendor ordinarily, to reclaim the goods in case of the insolvency of the vendee, as long as they remain in the possession of the carrier.[16]

11. It is not enough to defeat this right, that the transportation is accomplished, if the goods still remain under the care and control of the carrier, as in the case of a railway, in the warehouse of the company, awaiting the arrival of the vendee; or in the warehouse of a wharfinger, or warehouseman;[17] unless, as is said

[15] Litt *v.* Cowley, 7 Taunt. 169; Bohtlingk *v.* Inglis, 3 East, 381; Syeds *v.* Hay, 4 T. R. 260.

[16] See the cases cited under note 14. And it would not be regarded as a conversion in the carrier to retain the goods, after a demand from the vendor, for a sufficient time, to enable him to ascertain whether the right to stop *in transitu* ever existed, and if so, whether any intervening rights had accrued either by act of the vendor or the vendee, which would defeat it.

[17] Dodson *v.* Wentworth, 4 Man. & Gr. 1080, where Ch. J. *Tindal* thus states the distinction between the cases where the transitus is ended, by depositing in the warehouse of the carrier, or other person, and those where this does not have that effect.

"The warehouse, in which the goods were lodged was not the warehouse of the carrier; as some of the cases turn upon the point that the transitus is not at an end while the goods remain in the possession of the carrier, not only in the actual course of the journey, but even while they are in a place of deposit, connected with transmission. But the place of deposit here is the warehouse of a third party," and the question is whether the depositary acts "as the agent of the carrier, or the consignee."

In a late case, Harris *v.* Hart, 6 Duer, 606, this subject is discussed with great ability by a court of large experience in regard to commercial law, and an attempt is made to rescue the principle upon which all the cases profess to go

in some of the cases, the vendee, by special contract and understanding, is accustomed to use the warehouse of the carrier or

from something of that confusion into which some of the modern, and especially the American cases, have thrown it. The principle upon which the whole subject rests, is, that of giving the vendor a lien for the price of the goods, until they come into the actual possession of the vendee, or of his agent, for custody, and not for transportation. With this view all reasonable construction should be in favor of maintaining the lien. Hence in this last case it was justly held, that while the goods were in the course of transportation, even by the vendee's agent on board his own or a hired vehicle, the right to stop *in transitu* still existed.

And in the case of Sheridan *v.* The New Quay Company, 4 C. B. (N. S.) 618, where goods were sold to a party at Manchester to be forwarded to Liverpool for delivery, and were accordingly sent to L. and put into the hands of defendants, who were wharfingers and carriers at L., to be carried to Manchester for the vendee, it was held the vendor's right of stoppage *in transitu* was not gone. s. c. 5 Jur. (N. S.) 248.

And in the very recent case of Schotsman *v.* The Lanc. & Yorksh. Railw. Co., Law Rep. 1 Eq. 349; s. c. 12 Jur. (N. S.) 42 (1866), this precise point is very carefully considered by Lord *Romilly*, M. R., and the following propositions declared. The right of stoppage *in transitu* is not lost because the vessel on which the goods are shipped is the property of the vendee, if the vessel is a general ship, and is employed as a mere common carrier. It would seem to be otherwise if the vessel were sent by the vendee expressly to fetch these particular goods, or if any agent were on board expressly authorized to receive them; or if the bills of lading were delivered to the captain, or sent to the vendee.

It will be useful to state this case and the opinion of the court more at large, as the latest exposition of the English law upon the point.

"This was a question whether the right of stoppage *in transitu* existed under the following circumstances: In the month of July, 1864, the plaintiff, Emile Schotsman, a merchant at Lille, entered into a contract to sell to the defendant Cunliffe, who carried on business as Messrs. Fort & Co., of Goole, 1870 sacks of wheat flour, and accordingly directed Messrs. Delafosse Brothers, of Rouen, as his agents and on his behalf, to purchase and ship the same. The said Messrs. Delafosse accordingly, as the agents of the plaintiff, Emile Schotsman, shortly before the 28th of September, 1864, shipped 1870 sacks of wheat flour on board a screw steamer called The Londos, which was then bound from Rouen to Goole, and of which Thomas Woodhead was the master. This vessel belonged to Messrs. Watson, Cunliffe, & Co., which firm consisted of the defendant Cunliffe and of one other person. She was a general ship, trading and making regular passages between Rouen and Goole. The master of the ship, on the same 28th September, signed four bills of lading of the flour, one of which he retained himself, while he gave the other three to Messrs. Delafosse.

On the 30th September, Messrs. Delafosse having reason to doubt the solvency of Messrs. Fort & Co, indorsed one of the bills of lading, "Don't deliver to Messrs. J. Fort & Co., but only to Emile Schotsman, or to his order. Rouen, Sept. 30, 1864. (Signed) Freres Delafosse." The bill of lading, thus indorsed,

wharfinger as his own. In such case it is the same, when the goods are deposited in the warehouse of the carrier, or warehouse-

was sent by them to the plaintiff Schotsman, who indorsed it over and forwarded it to the other plaintiff, Craig, who was his agent in England.

On the 3d of October, 1864, a bill of exchange, in the hands of the plaintiff, Emile Schotsman, which was drawn by Schotsman, senr., of Douay, upon, and was accepted by, the said Messrs. James Fort & Co., for the sum of £1,000, fell due, and was duly presented for payment, but was dishonored, and had since been protested for non-payment.

On the same 3d October, 1864, the vessel arrived in the river Humber, under the same Thomas Woodhead as her master, and with the wheat flour on board. Craig, acting as the duly appointed attorney of Schotsman, immediately gave notice to Woodhead, the master, and to Cunliffe, of the stoppage *in transitu*, but was unable to prevent the flour being delivered to the defendants; the Lancashire & Yorkshire Railw. Co., who are the owners of extensive warehouses at Goole, and who, although notice was given them of the rights and claims of Schotsman, declared their intention of holding the same for Fort & Co., and had delivered part of the goods to them, or their order.

On the 11th October, 1864, the defendant Cunliffe, as James Fort & Co., was adjudicated bankrupt; and the defendant Banner had since been appointed creditor's assignee. The bill was accordingly filed against the Lancashire & Yorkshire Railw. Co., Cunliffe and Banner, to enforce the stoppage *in transitu*, and the suit now came on to be heard.

Baggallay, Q. C., Eddis, and Butt (of Common-law bar) for the plaintiff, contended, that as the ship was a general ship the stoppage *in transitu* was good, notwithstanding that the ship was the property of the defendant, who was himself the consignee of the goods. [They cited Mitchell *v.* Eade, 11 Ad. & El. 888; Van Castul *v.* Booker, 2 Exch. 691; Turner *v.* The Liverpool Docks Co., 6 Exch. 543; 1 Smith's L. C. 643, 4th ed. (notes to Lickbarrow *v.* Mason); and Heinckey *v.* Earle, 8 El. & Bl. 410.]

Jessel, Q. C., and Lawrence Bird, for the Railw. Company, contended that the right to stop *in transitu* was gone, the goods having previously got into the possession of the consignee, as owner of the ship. As the company had parted with the goods, no injunction could be granted in this case, and the Chancery Amendment Act, 21 & 22 Vict. c. 27, § 3, giving power to the court to award damages, did not apply, and consequently the court had no jurisdiction. [They referred to Chit. Contr. 390, 393, 7th ed.; The Mercantile Shipping Act, 1854, § 70; the 18 & 19 Vict. c. 111, § 3; Ogle *v.* Atkinson, 5 Taunt. 759; and Fowler *v.* MacTagart, cited by *Lawrence*, J., in Bohtlingk *v.* Inglis, 3 East, 396.]

Selwyn, Q. C., and Lindley, for the assignees in bankruptcy, cited Fragano *v.* Long, 4 B. & Cr. 219; 2 Selw. N. P. 1288, 1292; London & Northwestern Railw. Co. *v.* Bartlett, 7 H. & Norm. 400; Bohtlingk *v.* Inglis, 3 East, 381; Bolin *v.* Huffnagel, 1 Rawle's Amer. Rep. 1; Lucas *v.* Nockells, 2 J. & J. 304; and Whitehead *v.* Anderson, 9 M. & W. 518.

Sir J. *Romilly*, M. R., without calling for a reply, said: The general view of the case I take is this, — I think the principle of these cases is not much in dis-

man, or wharfinger, as if they had reached the warehouse of the vendee himself.[18]

pute, but the difficulty generally arises on a question of fact. I apprehend it will not be disputed on either side that in every case where there is a contract for the sale of goods between a vendor and a vendee, the property in the goods

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[18] Rowe *v.* Pickford, 8 Taunt. 83. This is the case of a trader in London who was in the habit of purchasing goods in Manchester and exporting them to the Continent soon after their arrival in London, and the goods in the mean time remained in the wagon-office of the carriers. It was held that the right of stoppage *in transitu* ceased upon the arrival of the goods at the wagon office. See also James *v.* Griffin, 1 M. & W. 20; Edwards *v.* Brewer, 2 id. 375. It is never deemed important, in order to defeat the right to stop *in transitu*, that the goods should have come to the very hands of the consignees. It is enough if they have come to the hands of some one acting for him. Ellis *v.* Hunt, 3 T. R. 464. If the consignee generally makes use of the wharfinger's warehouse as a place to keep his goods in, the transitus is at an end, when the goods are deposited there. Tucker *v.* Humphrey, 4 Bing. 516; Richardson *v.* Goss, 3 Bos. &. P. 119; Foster *v.* Frampton, 9 D. & R. 108; s. c. 6 B. & C. 107.

Wentworth *v.* Outhwaite, 10 M. & W. 436. This is the case where the goods were kept by the carrier as warehouseman at the end of the public carrier's route, until they could be sent for by the vendee, at his own convenience, and upon payment of warehousing. It was held the transitus terminated upon the arrival of the goods at the warehouse. This case is put by *Abinger*, Ch. B., with whom the court concur, upon the ground that the warehouseman was an agent of the vendee for receiving the goods and keeping them, *not for forwarding*, which showed the transitus at an end. Baron *Parke* also said: "The carriers held them, not as agents for forwarding them, but for their safe custody, and they were constructively in the possession of the vendee." Dodson *v.* Wentworth, 4 M. & Gr. 1080,, is a similar case, and decided upon the same ground. Dixon *v.* Baldwin, 5 East, 175. In Heinekey *v.* Earle, 8 El. & Bl. 410, goods were shipped by order to A., and the bill of lading made them deliverable to A. on paying freight; but on their arrival, A., being embarrassed, and not wishing to accept the goods, if he stopped business, objected to receive them, but they were afterwards landed and locked up in his warehouse, A. intending to warehouse them for the vendor, if he could so do. The vendor demanded the goods, and A. declined surrendering them, on the ground that his solicitor advised him he could not do so safely. The goods were subsequently assigned for the benefit of creditors; it was held that the transit was at an end.

Lord *Campbell*, Ch. J., said: "A mere delivery at the place of destination is not necessarily a termination of the transit. The transit remains until the goods have come into the possession of the consignee, and although they are landed at the place to which they are destined, unless the consignee has taken possession of them, I think they are still in transit. The merely putting upon the premises of the consignee, I think, could not necessarily be a termination of the transit." But in this case it was held, the consignee's consent to retain them determined the transit.

12. But by far the most difficult questions arise under this head in a class of cases, quite numerous, where the goods are

passes to the vendee as soon as the goods are delivered for his benefit to any common carrier, subject to the right of stoppage *in transitu*, before the actual or virtual delivery into possession of the goods takes place. The only question really is, whether that is so here or not; and the real question depends on this, whether there was an actual or virtual delivery of the goods when they were put on board the ship at Rouen; because, if there were, the stoppage *in transitu* was at an end; if there were not, there was a stoppage *in transitu* by the co-plaintiffs on the morning before they were delivered. It appears to me that a proposition has been stated on behalf of the defendant, which will not be disputed by anybody, that if the vendee of the goods sends his own ship for the goods, and they are delivered on board that ship, that is an actual delivery of the goods to the vendee, and there the matter ends; the stoppage *in transitu* is over, and nothing more can be said on the point. That I consider to be practically the decision in the case of Ogle *v.* Atkinson, *supra*. There may also be an actual delivery, although the ship is not the ship of the vendee. For instance, if the purchaser of the goods sends over an agent on his behalf to receive the goods for him, and they are delivered to him in the character of agent for the purchaser, then there is an actual delivery of the goods, and the stoppage *in transitu* is at an end. Now a very material matter in this case consists in this, — whether there is, in the absence of any thing being stated, an actual delivery to the owner of the ship, if the ship is a general ship for a general cargo? In the case of Ogle *v.* Atkinson (I think that was the case in which a quantity of hemp was dispatched from Riga), the purchaser of the goods expressly sent his own ship for those goods, and that is so found in the special case, and the captain was sent as agent of the purchaser to receive the goods. The court in that case held, that as soon as the goods were put on board that ship, they were actually delivered to him as his particular agent. It is true that he afterwards took in other goods, but the ship was sent expressly for the purpose of receiving those goods, and consequently it was analogous to the case which Mr. Bird put to me of the carrier being the purchaser of the goods, and sending one of his ordinary carrier-wagons to receive them, in which case no one could doubt the delivery would be perfect, and the stoppage *in transitu* would be at an end. But if the ship is a general ship, then, I apprehend, the case of Mitchell *v.* Eade, *supra*, determines that the ship stands expressly in the same situation as the common carrier. That is the important part of the decision in Mitchell *v.* Eade, and the mere fact that the ship which is used as common carrier is the property of the vendee, does not make the mere placing of the goods on board a delivery to the owner of the ship. That, in my opinion, is what is determined in Mitchell *v.* Eade, and that is the important part of the decision with reference to the case at present before me. I admit, indeed, — and that, as I stated to Mr. Selwyn, is a very material part of his case, — that although there may be no actual delivery, yet there may be a virtual delivery, which would amount to the same thing. If the bills of lading had been sent to Fort & Co. (to Mr. Cunliffe), then, I apprehend, the stoppage *in transitu* would have been at an end as soon as he got the bills of lading.

In this case what occurred was this: When the goods were put on board the

directed by a particular route, through successive lines of carriers, and at the intermediate points to the care of particular persons,

vessel, the captain signed four bills of lading, and he delivered three of them to Messrs. Delafosse & Co., as the shippers, and he retained one himself. I think those are the exact words which are stated in the bill and in the answer. That is very material, because if Messrs. Delafosse & Co. had delivered all the bills of lading to the captain, that would have put an end to the stoppage *in transitu*, and made a virtual delivery of the goods to Cunliffe, or the agent of Cunliffe. I am of opinion that the mere retention by the captain of that bill of lading cannot be treated in the same way, unless it was so retained by him under an express arrangement between them that it should be treated exactly as if he had delivered it. I think there is an analogy between the case of Mitchell *v.* Eade and the present case, though it is open to the distinction which Mr. Selwyn and Mr. Lindley have pointed out, and which Mr. Jessel enlarged upon very much, that it was not a case of vendor and purchaser. In that case the captain had signed the bill of lading and had delivered it to the shipper. But suppose the captain had afterwards made another bill of lading and signed it and kept it in his own possession, which he could have done the next day, would that have made any difference in the decision? It is clear that, according to the opinion of Sir J. *Campbell*, who argued that case, if the bill of lading had been delivered by the shipper to the captain, in that case, then, the ownership of the goods would have passed, or, to apply it to a case like the present, the stoppage *in transitu* would have passed. But it is impossible to say that the captain, who might have made the bill of lading the next day if he thought fit to do it, without the sanction of the shipper, could by that means have created the transfer of the property which the shippers did not intend to take place. So also in this case I am of opinion, that if the captain had thought fit to make a bill of lading and sign it himself immediately after the delivery of the three bills of lading to the shipper, that would not have taken away the right of stoppage *in transitu* from the shipper, not having been done with his sanction, and not being done with the intention of an actual delivery of the goods.

This is the general view I take of the case. It is very important to observe, and it should always be borne in mind, that there is a distinction between Mr. Cunliffe, or Messrs. James Fort & Co. (whichever name you please to call him by) and Messrs. Watson, Cunliffe, & Co. They are two distinct sets of persons. It is very true that Mr. Cunliffe was (if I may use a species of anomalous expression) the sole partner in one firm, and that he was partner with another person in the other firm. But they are totally separate and distinct characters; and in courts of law we have constantly to deal with that circumstance. One man frequently unites in his own person different characters. He may be a consignee and an executor, but what he does as an executor does not affect what he does as consignee. This vessel was a vessel that duly advertised as a trading vessel between Goole and Rouen by Messrs. Watson, Cunliffe, & Co., for the common carriage of goods, and, therefore, it appears to me that this was not a vessel sent by Cunliffe for the reception of those goods, but that it was a mere common carrier. The expression in Cunliffe's answer, which I marked last night, is this. It is at the end of paragraph 5 of the answer. "I admit that Messrs. Delafosse

who may be wharfingers, forwarding merchants, warehousemen, carriers, or combining two or more of these capacities. But

did thereupon, and, in fact (but whether or not as the agents of and on behalf of the plaintiff, Emile Schotsman, I cannot set forth as to my belief or otherwise), on or about the 28th September, 1864, ship 1870 sacks of wheat flour on board a screw steamer called The Londos, and that the said Londos was then bound from Rouen to Goole, and that she was trading, and advertised to be trading, between those ports, and that she brought over from Rouen to Goole a general cargo, and that Messrs. Watson, Cunliffe, & Co. were the agents and consignees of the said ship, and that Thomas Woodhead was the master thereof."

Now I admit that if Cunliffe, hearing that this flour had been purchased for him, had sent this ship expressly for the purpose of taking that flour, and had sent the captain for the purpose of receiving the flour, and had so informed Messrs. Delafosse & Co., though he had taken in other goods and another cargo, then it would have come within the case of Ogle *v.* Atkinson (*supra*); and there would have been an actual delivery the moment they were put on board the vessel. But the vessel being of that description, then I am of opinion that unless they were intended to be delivered to some express agent of the purchaser, there was no delivery by putting them on board the ship. Putting them on board the ship is nothing more than this, that it is necessarily putting them within the control of the captain of the ship; and the fact that the captain of the ship is appointed by the owner of the ship does not make him a bit more the agent for the receipt of these goods than if any other person had appointed him. It is all involved in the question whether the ship was a ship trading generally, or was specially sent for the express purpose of receiving these goods. If not, the delivery of them on board the ship is only delivering them to the captain, who has the control of the ship, and he is only agent for the owner for the general purposes of the ship, and not for the express purpose of receiving these goods, unless he has been expressly deputed as his agent for that purpose.

I have admitted that if the bills of lading were delivered to him as the agent of the vendee for the purpose of transferring the property, there would be a virtual delivery, and that would put an end to the stoppage *in transitu*. But although I confess the evidence is meagre on that subject, I think it does not amount to that. The evidence which is stated is this, and there is nothing more on the subject. The master, on the 28th September, signed four bills of lading of the flour, one of which he retained and the other three of which he handed back to the said Messrs. Delafosse. I find no other evidence on the subject.

Now, Mr. Jessel, in pointing to the extremely meagre character of the evidence on this point, wanted to bring me to this conclusion, that I must presume every thing that is not proved against the plaintiff; but I am not of that opinion. If the defendants rely on the delivery of the bill of lading to the captain, it is for them to prove it. The presumption appears to me to be, that the ship was a general ship, and that the putting of the flour on board was not by itself a delivery. If it is contended that the delivery of the bill of lading amounts to a virtual delivery, this is altogether a separate matter, which must be duly proved.

There seems to be no question of the right of the unpaid vendor to stop the

where one had employed an agent at an intermediate stage in the transit to forward all goods coming to that port for him, it was held not to terminate the transitus when the goods reached the hands of such agent and were by him forwarded by another ship.[19] A usage for carriers to detain goods on a lien for the general balance of account between them and the consignees, will not affect the right to stop *in transitu*.[20]

13. The principle by which the question of the continuance of the transitus is determined in this class of cases, is the same already stated. If the person to whose custody the goods are consigned, at an intermediate point, is only to be regarded as an agent, for forwarding, or keeping, or carrying, in the course of the transportation, then the transitus is not ended. But upon the other hand, if such person, although a carrier, or connected with the carrying business, is to keep the goods for the consignee, and, as his agent, or in that capacity, to give them a new destination, or so to keep them until the consignee can send for them, or dispose of them, or give them a new destination, in all these cases the transitus is ended.[21]

14. Railway companies, from the manner of transacting their business, would not be likely to be exposed to the raising of such questions very often, while the goods were in their custody. But as many of the long lines of transportation consist of numerous independent routes, and often in different countries, states, or kingdoms, such questions very frequently arise upon prior portions of the line, which they are by the rules of law compellable to solve, at their peril, upon an admonition by telegraph, from an un-

goods in the course of the transit, even after they come into the hands or control of a particular person named by the vendee as his agent for the purpose of receiving and forwarding the goods. Carfan *v.* Campbell, 6 Am. Law Reg. 561, citing Covill *v.* Hitchcock, 23 Wend. 611. But where the bill of lading is *bona fide* obtained from those having the general authority to negotiate it, and value paid in faith of it, the right to stop *in transitu* is gone, although the party negotiating it be guilty of fraud as to another party to whom it had been contracted and value paid. Pease *v.* Gloahec, Law Rep. 1 P. C. 219; s. c. 12 Jur. (N. S.) 677.

[19] Nichols *v.* Le Feuvre, 2 Bing. N. C. 81; s. c. 2 Scott, 146.

[20] Openheim *v.* Russell, 3 B. & P. 42.

[21] Cases cited under note 8. See also Covell *v.* Hitchcock, 23 Wend. 611. And where it is the practice of a carrier, at a particular place, to deposit goods upon a public wharf, and for the consignees to come and take them away at their pleasure, no one having any further charge of them, it was held, that the transitus ended upon the goods reaching the wharf. Sawyer *v.* Joslyn, 20 Vt. 172.

known party, a thousand miles distant, which renders it of consequence that they should be able to obtain competent counsel upon questions of this character.[22] It is the same, in regard to all goods put into the custody of a carrier by a subordinate party, if demanded by the party having superior right, the carrier must surrender them to him, or he is liable in trover if the goods still remain in his possession, otherwise if he have finished his office in regard to them.[23] It seems to be settled, that the right to stop goods *in transitu* is divested, by the *bona fide* purchase of the assignment of the bill of lading, without notice of fraud in any intermediate assignee, although, as between some of the former parties there may have existed such an extent of bad faith as to vitiate the assignment or transfer of the bill of lading as between these particular parties.[24] So an order for the delivery of the goods, after their arrival in port, given to one who had paid the freight, and held the assignment of the bill of lading, no delivery being made before notice to stop the goods in transitu, will not defeat the right of the vendor.[25]

15. There seems to be some confusion in the cases in regard to the right of a third party to interpose his claim between the bailor and bailee. It is perfectly well settled that the bailee cannot defend against the claim of the bailor, by showing a better outstanding title to the thing, in a third party, who has made no claim upon him.[26] But it is settled, that the bailee may defend against the claim of the bailor, by showing the goods have been taken from him by legal process.[27] Hence in cases of this kind the more common course is for the interposing claimant to resort to the writ of replevin; and sometimes to a writ of interpleader,

[22] Guildford, Clark, & others *v.* Smith, Eldridge, & Lee, Trustees of the Vermont Central Railw., a case involving these questions, 30 Vt. 49.

[23] Ogle *v.* Atkinson, 5 Taunt. 759; Wilson *v.* Anderton, 1 B. & Ad. 450. It is a good defence to the carrier, that he has surrendered the goods according to the order of the bailor before he receive counter orders from the superior owner, and until that the carrier cannot dispute the title of his bailor. Story on Bailm. § 582.

[24] The Argentina, Law Rep. 1 Adm. 370; Pease *v.* Gloahee, Law Rep. 1 P. C. 219.

[25] Coventry *v.* Gladstone, Law Rep. 6 Eq. 44.

[26] Gosling *v.* Birnie, 7 Bing. 339; Holl. *v.* Griffin, 10 Bing. 246.

[27] Burton *v.* Wilkinson, 18 Vt. 186. If this defence were not valid, it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do.

in order to settle the rights of the contending parties, if no other adequate remedy exists.

16. But we apprehend there is no necessity for any such resort. Wherever the bailor obtains possession of the goods by force or fraud, or attempts to retain possession of them through the carrier, after his title has expired, in analogy to the case of landlord and tenant, the bailee may, upon having notice to surrender the goods to the rightful owner, under penalty of a suit, yield to the claim of the rightful proprietor, and defend against that of the fraudulent or wrongful bailor.[28] And, as is said before, the rule seems now to be settled, that in such case the carrier must deliver the goods to the rightful owner at his peril.[29]

[28] *Post*, § 188; Swift *v.* Dean, 11 Vt. 323; Turner *v.* Goodrich, 26 Vt. 707. The carrier, where goods are shipped in the name of one not the owner, may prove in excuse for not delivering them to the shipper, or his assigns, that they were taken from him by lawful process against the rightful owner, against his will. Van Winkle *v.* U. S. M. S. Co., 37 Barb. 122; Bates *v.* Stanton, 1 Duer, 79.

[29] Story on Bailm. § 450. *Littledale*, J., in Wilson *v.* Anderton, 1 B. & Ad. 458. "He may show that the title of the lessor has been put an end to; and therefore in an action of covenant by the lessor, a plea of eviction by title paramount, or that which is equivalent to it, is a good plea, and a threat to distrain, or bring an ejectment, by a person having good title, would be equivalent to an actual eviction."

SECTION XXI.

Effect of Bill of Lading upon Carrier.

1. *Between consignor and carrier the bill of lading is* primâ facie *evidence.*
2. *But questions of quantity and quality of goods cannot be raised where intermediate carriers are concerned.*
3. *Bill of lading may be explained by oral evidence.*
4. *Express promise to deliver goods in good order, by a day named.*
5. *Effect of stipulation for deduction from freight, in case of delay.*
6. *If carrier demand full freight, in such case he is liable to refund.*
7. *Must be forwarded according to bill of lading.*
8. *Effect of separate bills of lading to different owners.*
9. *Right of consignee in unlading goods.*
10. *Effect of indorsement and delivery of bill of lading.*
11. *Exception of responsibility for leakage extends to extraordinary as well as ordinary leakage.*
12. *But the carrier must show no want of care on his part.*
13. *Statement in bill of lading as to state of goods only* primâ facie *evidence of fact.*
14. *Passenger's baggage not at his own risk by reason of any notice printed on his ticket and posted in the company's office, unless brought home to the owner.*
15. *Bill of lading construed with reference to the nature of the route and the course of business.*
16. *The after carriers may pay back freight, in conformity with the bill of lading.*
17. *And the bill is conclusive as to third parties who act upon it.*
18. *An exception in the bill of lading does not affect its general construction.*
19. *The bill is evidence only, as between the parties, but conclusive as to parties acting in faith of it.*
20. *But in cases of fraud the estoppel will not bind the owner of a vessel or his interest in it.*
21. *Delivery must be made, if practicable, as agreed. Carrier must show loss caused by excepted risks.*
22. *Construction of terms of bill of lading affected by usage, &c.*
23. *Assignment of bill of lading transfers the title to goods, but not the claim for damages.*

§ 187. 1. It is common for a bill of lading or the receipt for goods, executed by the station-agent, to describe them as in good condition. In such case this is always *prima facie* evidence against the carrier of that fact, even between the immediate parties to the contract, and may become conclusive upon the carrier, where the consignee or other parties have acted upon the faith of such representation, and have made advances, or given credit, relying upon its truth.[1]

[1] *Shaw*, Ch. J., in Hastings *v.* Pepper, 11 Pick. 43; United States Cir. Court, N. Y. Dist. 7 W .Law J. 302; Price *v.* Powell, 3 Comstock, 322. Declarations of the master, while in charge of the goods, are evidence against the ship-owner. McCotter *v.* Hooker, 4 Selden, 497, where it is held, that a mere receipt for the

2. But in regard to parties who have no direct interest in the goods, and no authority to adjust any deficiency or damage; who are but intermediate carriers, or middle-men, between the consignor and consignee, such questions cannot be raised, in an action for freight.[2]

goods does not merge the previous oral agreement. And a receipt for a sealed package of money, "said to contain" a given amount, is not even *prima facie* evidence that it did contain that amount. Fitzgerald *v.* Adams Express Co., 24 Ind. 447. Nor is a common carrier bound to receive money for transportation unless properly secured and addressed; nor will the refusal to count the money raise any presumption against the carrier as to the amount. See also Dunn *v.* Branner, 13 La. Ann. 452.

But where the packages are described in the bill of lading "weight and contents unknown," and one of them is in bad condition on arrival, and the mode of packing is such that it would not readily have been discovered, it requires proof that it was not so when delivered. U. S. Cir. Court, *Nelson*, J., The Columbo, 19 Law Rep. 376. In McCready *v.* Holmes, 6 Law Reg. 229, in the District Court of the United States for the District of South Carolina, in October, 1857, it was held, that though a carrier, in the absence of evidence of fraud or mistake, is concluded by the receipt or bill of lading, as to the quantity or amount of the goods shipped; yet, in an action for the freight, where the consignee has received the goods at the wharf, without qualification or reservation of the right to inspect, weigh, or measure them, and the carrier proves due care of them during the transit, and an actual delivery of all in his possession on his arrival, the burden of proof is on the consignee to establish that a deficiency in the quantity specified in the bill of lading, afterwards discovered, is chargeable to the wrongful act or neglect of the carrier.

A bill of lading expressed to have received the goods "in apparent good order," may be explained by parol, and it may be shown that the goods had been in fact injured before received. Blade *v.* Chicago, &c., Railw., 10 Wisc. 4. The bill of lading is presumptive evidence of the condition of the goods, and if the goods do not arrive, or not in the condition stated, the carrier is *prima facie* responsible. Tarbox *v.* Eastern Steamboat Co., 50 Me. 339; Great Western Railw. *v.* McDonald, 18 Ill. 172.

A contract by which a carrier covenanted with a manufacturer of salt to carry from twelve hundred to five thousand bushels of salt, annually for three years, gives the election as to the amount to the manufacturer. White *v.* Toncray, 9 Leigh, 347.

[2] Canfield *v.* The Northern Railw. Co., 18 Barb. 586. In this case, a quantity of wheat was shipped at Detroit on board the ship Argo, for Ogdensburg, consigned to B. & L., Montpelier, Vt., care of Northern Railw. Co., N. Y. The master delivered the wheat to defendants, in pursuance of the bill of lading, but on measurement it fell short one hundred and seventy-five bushels of the quantity named in the bill. The master demanded freight of defendants upon the quantity carried and delivered, which defendants refused to pay, but offered to pay freight, deducting the deficiency in the wheat. This suit is for the freight demanded. Defendants claimed, —

3. But where the bill of lading is given, when the goods are so packed as to be incapable of inspection, and prove to have been in fact damaged when they were shipped, this may be shown by oral evidence.[3] But as a bill of lading is *quasi* a negotiable instrument, if negotiated it is binding upon the ship-owner.[4] In general a bill of lading is not to be contradicted and controlled as to the terms of the contract by oral evidence.[5] And where the carrier gave a receipt for goods to be forwarded, and specified among other things "one cradle," the cradle being wrapped in a piece of carpet and bound with cords, and the evidence went to show that the plaintiff told one of defendants' agents that it contained a valise, it was held they were liable for the loss of the valise.[6]

4. The stipulation in a bill of lading to deliver goods within a

1st. They were not liable for freight, and if so, —

2d. They had tendered all the plaintiffs were entitled to demand of them.

It was held, that defendants were liable to the plaintiff for the freight actually earned on the wheat delivered.

On the first point in the defence, the court say, "The usual clause in a bill of lading, making the payment of freight by the consignee a condition of the delivery of the goods, is inserted for the benefit of the carrier. It is regarded as a letter of request from the consignor, and the reception of the property causes an implication that the consignees intend to comply with the request. The law implies a promise upon which the carrier may found an action for the freight. Abbott on Ship. 421; 3 Kent, 219; 3 Bing. 383. This is the settled rule as regards the *final* consignee named in the bill. I see no good reason why a rule, which looks with a single eye to the rights of the carrier, should not be applied to every consignee named, whether *final* or *intermediate*."

As to the second point, the court say, substantially, that defendants were middle-men, all their powers and rights are derived from the terms of the bill of lading, as intermediate consignees, and there is no agency in behalf of the owner, authorizing the defendants to make any adjustment. See also Bissell *v.* Price, 16 Illinois, 408.

[3] Gowdy *v.* Lyon, 9 B. Mon. 112. And a bill of lading for a specified number of tons of iron, "weight unknown," binds the carrier, in the absence of fraud, to deliver only so much as he actually receives. Shepherd *v.* Naylor, 19 Law Rep. 43; Bissell *v.* Price, 16 Illinois, 408.

[4] Howard *v.* Tucker, 1 B. & Ad. 512. See also Cox *v.* Peterson, 30 Ala. 608.

[5] May *v.* Babcock, 4 Ohio, 334; The Schooner Reeside, 2 Sumner, 567; Angell on Carriers, §§ 228, 229. And it is not competent to show a usage contradicting the terms of the bill of lading or the general liability of the carrier. The Schooner Reeside, *supra;* Angell on Carriers, § 228; Layword *v.* Stevens, 3 Gray, 97.

[6] Harmon *v.* New York & Erie Railw., 28 Barb. 323.

specified time, in good order, the "dangers of the railway, fire, leakage, and other unavoidable accidents excepted," binds the carrier to deliver within the time absolutely, the exception having reference exclusively to the condition of the goods[7] when delivered.

5. And an agreement to deliver, at the place of destination, on a day named, with a provision that the carrier shall deduct a fixed sum from the freight for each day's delay beyond that time, was held to be an unconditional contract to deliver by the day named.[7] But the reason and good sense of the case would seem to indicate that if the carrier made the stipulated deduction from freight, fixed in his contract for the delay, he was not liable beyond that for delay merely, and so the court seems to have viewed the subject.

6. But where the carrier in such case demanded full freight, not consenting to deduct the price fixed in the contract for the delay, it was very justly held to be a payment by duress of circumstances, and the excess recoverable of the carrier.[7]

7. In an important case,[8] recently determined by an experienced court, it was held that where the bill of lading required the goods to be reshipped at an intermediate port, by a particular ship, and they were reshipped in another ship, that the contract had not been complied with, and that the carriers must be considered as insuring the goods against loss, even if it arose from causes excepted by the bill of lading. And where goods are delivered to a railway company, for carriage, and a receipt taken by the consignor, upon which he obtains an advance by the consignee, the consignor subsequently obtaining a redelivery of the goods to him-

[7] Harmony *v.* Bingham, 1 Duer, 209. In this case the covenants to deliver, in a specified time, and in good order, and for the deduction, in case of failure, were separate covenants.

The recovery was in fact limited to the damages specified in the contract, thus making, in effect, a contract to deliver by a certain day, or deduct a certain sum for each day's delay from the freight. See Place *v.* Union Express Co., 2 Hilton, 19.

[8] Bazin *v.* Richardson, Circuit Court of the U. S. Philadelphia, May, 1857, Law Reporter, July, 1857, 129; Merrick *v.* Webster, 3 Mich. 268. And in Bristol *v.* Rensselaer & Saratoga Railw., 9 Barb. 158, it was held, that the receipt of a package marked "L. W. B., care of S. W., Troy," by a railway agent, implied the duty to deliver, according to the mark, and nothing more, although S. W. is another agent of defendants. See also Fearn *v.* Richardson, 12 L. Ann. 752; Hatchett *v.* Steamboat Compromise, id. 783.

self, and the company in consequence being compelled, under threat of legal proceedings against them, to refund to the consignee the money advanced by him, it was held they might recover the amount so paid of the consignor.[9]

8. If the shipper give separate bills of lading to the different owners of wheat shipped under one contract in gross, he is liable to each owner for the conversion of his portion.[10]

9. There is a recent English case, in regard to the respective rights of carriers and consignees, depending upon the construction of a bill of lading, of some practical importance. By the terms of the bill of lading the consignee was bound to be ready to receive the goods simultaneously with the ship being ready to unload, and in default the master might land the goods at the expense of the consignee. The consignee not furnishing lighters in time, after due notice of the arrival of the ship, the goods were partly landed on the wharf when the consignee arrived with lighters and demanded that the remainder should be delivered into the lighters, which was refused, and the unloading completed on the wharf. A suit being brought for the wharfage due, it was held, that, in the absence of evidence that the carriers would be greatly injured thereby, the consignee was entitled to have the delivery completed into the barges.[11]

10. The transfer by indorsement and delivery of the bill of lading passes to the indorsee all vested as well as contingent rights of action, even though the goods are not, at the time of the indorsement, still at sea.[12]

11. Where the bill of lading in the usual form contained the memorandum "weight, measurement, and contents unknown, and not accountable for leakage," it was held to protect the carrier as to all leakage, whether ordinary or extraordinary, unless caused by negligence.[13]

[9] Midland Great Western Railw. *v.* Benson, 30 Law Times, 26. A suit against a carrier for breach of his contract, as such, must be upon the bill of lading, under the code where such bill is given, and embraces the terms of the contract. The terms of such bill of lading cannot be varied by parol evidence. Indianapolis, &c. Railw. Co. *v.* Remmy, 13 Indiana, 518.

[10] Wright *v.* Baldwin, 18 N. Y. 428.

[11] Wilson *v.* London & Italian Steamship Co., Law Rep. 1 C. P. 61; s. c. 12 Jur. (N. S.) 52.

[12] Short *v.* Simpson, Law Rep. 1 P. C. 248; s. c. 12 Jur. (N. S.) 258.

[13] Ohrloff *v.* Briscall, Law Rep. 1 P. C. 231; s. c. 12 Jur. (N. S.) 675.

12. Where the bill of lading exempted the carrier from responsibility "for rust or breakage," proof of injury to the goods by breakage nevertheless makes out a *prima facie* case of negligence against him; and he must then show the exercise of due care and vigilance on his part to prevent the injury, unless the nature of the injury or of the goods furnishes evidence that due care and diligence could not have prevented the injury.[14]

13. The statement in a bill of lading, that goods were received in good order, is not conclusive evidence of that fact; but it is competent to show such was not the fact.[15] By such a receipt the onus is put upon the carrier in an action for the non-delivery of the goods, to show that the goods were not in the condition stated in the receipt.[15] And where the evidence is conflicting, and leaves it doubtful whether the alleged default occurred while the carrier sued had charge of the goods or while they were in the custody of another, the court will not disturb the verdict.[15] And a carrier who receives goods from another carrier is responsible directly to the owner of the goods.[15]

14. A passenger upon a railway, having a free pass for himself, purchased a ticket for his wife, who accompanied him, and put her trunk in charge of the proper agents of the company, without informing them that the trunk was not his own. He was held entitled to recover against the company for the loss of the trunk, and was held not affected by any notice on the check delivered to him, having printed on its face, "Look on the back," the same notice being posted in the office of the company, among others which it appeared the plaintiff had read.[16]

15. A bill of lading for an entire route of transportation consisting of two divisions, is to be construed with reference to the

[14] Steele *v.* Townsend, 37 Ala. 247.

[15] Ill. Central Railw. Co. *v.* Cowles, 32 Ill. 117. The bill of lading binding unless disproved. Coulthurst *v.* Sweet, Law Rep. 1 C. P. 649.

Damage for delay in transportation. — The shipper cannot recover as damages the premium paid by him for insurance upon the goods while the vessel was lying in a port to which she was driven for repairs by reason of her unseaworthiness. The carrier, in such case, becomes the insurer. The common carrier owes indemnity to the shipper of goods for delay in the transportation, and legal interest upon the price of the goods during the period of the delay may be recovered, as the measure of such indemnity. Murrell *v.* Dixey, 14 La. Ann. 298.

[16] Malone *v.* Boston & Worcester Railw. Co., 12 Gray, 388.

nature of the transit, and the natural and ordinary course of transacting the business connected with the transportation. If in such transport any obstacle should intervene, which by the regular course of the trade is liable to occur and retard the forwarding for a time, the master cannot, on account of not being able to find storage at the port, turn about and carry the cargo to some other port and there store it and depart. He should wait. And, where there is easy telegraphic communication, inform the consignees of his difficulty, that they may, if they desire, send him instructions.[17]

16. It has been held, that a custom to treat the statement of the amount of the goods in a bill of lading, as conclusive upon the carrier, is unreasonable and void.[18] But where the last carrier in a line paid the freight to the former carriers, according to the bill of lading, and in compliance with the custom of the company known to the consignee, it was held they were not responsible for any deficiency in the weight of the cargo, which appeared on reweighing at the termination of the transit, it not being the usual custom of such company to reweigh at such point, and this understood by the consignee.[19]

17. A bill of lading has been held conclusive against the master of a vessel in favor of a consignee, not party to the contract, but who had advanced money on the faith of its statements as to the amount and condition of the property, and which from the whole instrument and the usages of trade may be regarded as absolute statements from the master's own knowledge, but it is not conclusive against the owners as to property not shipped, the master having no authority in regard to that.[20] But such bill of lading is not conclusive against the master as to the amount of goods put on board, and the consignee cannot recover against the master for the full amount named in the bill of lading, being more than the amount actually put on board, where he has not paid for the goods

[17] The Convoy's Wheat, 3 Wallace, 225.

[18] Strong *v.* Grand Trunk Railw., 15 Mich. 206.

[19] Naugatuck Railw. *v.* Braidsley, 33 Conn. 218.

[20] Grant *v.* Norway, 10 C. B. 665; Coleman *v.* Riches, 16 C. B. 104; Hubbersty *v.* Ward, 8 Exch. 330; Jessel *v.* Bath, Law Rep. 2 Exch. 267. In the case last cited, a printed clause in the bill of lading, "contents and weight unknown," controlled the written entry of the goods being estimated as of a certain weight. See also Backus *v.* Schooner Marengo, 6 McLean, C. C. 487; Byrne *v.* Weeks, 7 Bosworth, 372; Sears *v.* Wingate, 3 Allen, 103.

on the faith of the bill of lading, and is only to pay the shipper for what he receives, unless he can recover of the master the difference between this amount and the amount named in the bill of lading.[21]

18. Where the contract of affreightment was general, without naming any exceptions to the risk, and the bill of lading contained the clause, "the dangers of the seas only excepted," it was held not to enlarge the responsibility of the carriers so as to render them liable for loss by the public enemy.[22]

19. The bill of lading, as to the receipt of the goods, is not held conclusive upon the parties to the instrument, but only in the nature of evidence, like any other receipt, good until contradicted or qualified by other evidence.[23] But as to third parties, who may have been induced to deal with the goods on the faith of the facts recited in the bill of lading, such recital must be treated as an estoppel upon the parties to the instrument.[24] But this principle will not apply in favor of a party who derived his title to the goods before and independent of the bill of lading.[25]

20. As a general principle the contract of the master in regard to freight binds the ship and the general owner of the ship, although chartered by another, and the master is acting under the orders of the charterer.[25] But no such implication arises in reference to bills of lading for property not shipped, designed to be instruments of fraud, and they create no lien upon the interest of the general owner, although the charterer was the perpetrator of the fraud. And although the charterer is estopped in such case from showing that no property was shipped, that estoppel will not bind the general owner.[25]

21. Under a bill of lading stipulating for the delivery of the goods at a particular place, this must be done, if practicable, with safety.[26] But where the goods are lost by perils, excepted in the

[21] Hall *v.* Mayo, 7 Allen, 454; Ryder *v.* Hall, id. 456. See also Kelly *v.* Bowker, 11 Gray, 428. The general proposition, that the bill of lading is *prima facie* evidence of the facts recited therein, is maintained in a large number of cases. Benjamin *v.* Sinclair, 1 Bailey, 174; O'Brien *v.* Gilchrist, 34 Me. 554; Tarbox *v.* Eastern Steamboat Co. 50 id. 339; Allen *v.* Bates, 1 Hilton, 221.

[22] Gage *v.* Tirrell, 9 Allen, 299. See also Byron *v.* Steamboat Belfast, 40 Alab. 184.

[23] Meyer *v.* Peek, 28 N. Y. 590.

[24] Statute 18 & 19 Vict. ch. 111, § 3; Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182.

[25] Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182.

[26] Shaw *v.* Gardner, 12 Gray, 488.

bill of lading, the burden of showing that fact rests upon the carrier.[26]

22. Terms used in a bill of lading, as in other written instruments, will receive such construction as the usage of the business requires.[27] But a bill of lading acknowledging the receipt of goods "to be forwarded across the Isthmus," and then to be reshipped, will not make the carrier a mere forwarder as to the transportation across the Isthmus, but he will be regarded as a carrier notwithstanding the use of the term "forwarded," that being used here in the popular sense of "carried."[28]

23. In a very elaborate opinion[29] by *Shaw*, Ch. J., after two arguments, and one decision of the court to the contrary, the cases are carefully reviewed, and the proposition maintained, that the indorsement of the bill of lading only transfers the title to the goods, and not the right of action in the shipper for any injury done during the transportation, and that an action may be maintained in the name of the shipper to recover for such injury, notwithstanding he has parted with all interest, general or special, in the goods.

[27] Wayne *v.* Steamboat Gen. Pike, 16 Ohio, 421.

[28] Simmons *v.* Law, 8 Bosworth, 213.

[29] Blanchard *v.* Page, 8 Gray, 281; S. P. Joseph *v.* Knox, 3 Camp. 320.

SECTION XXII.

Carriers' Lien for Freight.

1. *Lien exists, but damage to goods must be deducted, and freight must be earned.*
2. *But if freight be paid through to first carrier, lien does not ordinarily attach.*
3. *A wrong-doer cannot create a valid lien against the real owner.*
4–8. *Illustration of the point last stated.*
9. *Passenger carrier has lien upon baggage for fare.*
10. *Carriers have no lien for general balance of account.*
11. *Lien may be waived in same modes as other liens.*
12. *Delivery obtained by fraud, goods will be restored by replevin.*
13. *Last carrier in the route may detain goods till whole freight paid.*
14. *Carrier cannot sell goods in satisfaction of lien.*
15. *Owner may pay freight, and sue for goods lost.*
16. *Carrier is bound to keep goods reasonable time, if refused by consignee.*
17. *Lien does not cover expense of keep.*
18. *Covers back charges.*
19. *Lien for freight in favor of the last company not affected by defaults of the first company.*
20. *Carriers have no lien for freight on goods carried for the national government.*
21. *When goods accepted at intermediate place, freight* pro rata. *Goods paid for, freight may be deducted.*
22. *If goods are unlawfully detained, the consignee, being ready to pay freight, may maintain trover, without formal tender.*
23. *Consignees indorsing bill of lading, without recourse, or a mere servant or agent, not responsible for freight.*
24. *Waiver of lien presumed from unconditional delivery.*
25. *Delivery of part of cargo no waiver as to whole. Question of fact.*
26. *No lien for dead freight. Owner of vessel chartered to another has no lien for hire of vessel.* Sed quære.
27. *No lien for general balance. Such custom void.*
28. *What acts by carrier amount to conversion.*
29. *No lien for freight until voyage begins, or where special contract as to payment.*
30. *Freight may be demanded before delivery. Only payable according to bill of lading, same as* § 25.
31. *Lien on goods at end of voyage for all the freight carried.*
32. *Where carrier claims more than is due, it dispenses with tender of amount actually due.*

§ 188. 1. As a general rule the carrier is entitled to a lien for freight upon the goods carried.[1] But if he once deliver the goods, this lien is waived.[2] Or if the goods be damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury

[1] Skinner *v.* Upshaw, 2 Ld. Raym. 752. And so also for advances made for freight and storage by other carriers. White *v.* Vann, 6 Humph. 70; Galena & Chicago Railw. *v.* Rae, 18 Ill. 488.

[2] Boggs *v.* Martin, 13 B. Monroe, 239, 243. This lien extends to all the freight upon the goods throughout their transportation which may be advanced by the last carrier or warehouseman. Bissel *v.* Price, 16 Ill. 408.

from the freight.[3] But the goods must be carried and ready for delivery, or the carrier has no right to detain them for freight, the performance of the contract, on the part of the carrier, being a condition precedent to the right to demand freight.[4]

2. In general the consignor of goods is *prima facie* liable to the carrier for freight, but the consignee may, by the implied understanding at the time of shipment, and by the relation he sustains to the goods, be the only party liable; or the consignor and consignee may both be liable, either jointly or severally.[5] But the owner of the goods is always the proper party to bring an action for the loss or injury of the goods, and may generally be held liable for the freight.[6] The person receiving the goods is responsible for freight, and damages by injury to the goods or non-delivery

[3] Same case as n. 2. Snow *v.* Carruth, Dist. Court U. S., Dist. of Mass., before *Sprague*, J., 19 Law Rep. 198, where the cases of Davidson *v.* Gwynne, 12 East, 380, and Sheelds *v.* Davies, 4 Camp. 119; s. c. 6 Taunt. 65, are considered and overruled, so far as this question is concerned.

The right of the owner of the goods to insist upon any damage done the goods, for which the carrier is liable, by way of recoupment, or deduction from the freight, is well established in this country, and is a most elementary principle, as applicable to analogous cases. Bartram *v.* McKee, 1 Watts, 39; Leech *v.* Baldwin, 5 id. 446; Humphreys *v.* Reed, 6 Wharton, 435; Edwards *v.* Todd, 1 Scam. 462. But it is said the carrier is not liable to have damage done by some other party in the transit deducted from his lien. Bowman *v.* Hilton, 11 Ohio, 303. But it is no answer to the carrier's lien that the goods have been damaged during the transit by inevitable accident, to an amount exceeding that of the lien, provided they were still of sufficient value to satisfy it. Lee *v.* Salter, Lalor's Supp. to Hill & Denio, 163.

And where goods were carried by a continuous line of steamboats and railway from New York to Fitchburg, Mass., being delivered upon the pier of the steamboat company in good condition, and having been injured before their arrival at Fitchburg to an amount exceeding the freight, it was held no defence against the claim to set off the damage to the goods against the claim for freight at the suit of the last railway company, in the line of transportation, that the damage accrued to the goods before the goods were laden upon the boat, and without negligence on the part of the carriers. The Court say, the carrier, in such case, may, if he choose, make a special acceptance of the goods, as a warehouseman, during the period between the delivery and the departure, but unless that is shown, he is liable, as carrier, from the time of the delivery for transportation. Fitchburg & Worcester Railw. *v.* Hanna, 6 Gray, 539.

[4] Palmer *v.* Lorillard, 16 Johns. 348. Opinion of *Kent*, Chancellor, and cases cited.

[5] Moore *v.* Wilson, 1 T. R. 659.

[6] Danes *v.* Peck, 8 T. R. 330.

may be first deducted.[7] And the relation of debtor and creditor must exist between the carrier and the owner of the goods, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien.[8] Hence where one shipped goods at Burlington, upon Lake Champlain, for Detroit, Michigan, care of D., by common carriers, through whom he had previously transported goods to Detroit and paid the freight in advance; the goods coming into the possession of another line of carriers at Troy, N. Y., without the knowledge of the owner, and being by them transported to Detroit, consigned to the care of F., who was a warehouseman and forwarder, and who, without knowledge of the facts stated, advanced the freight due upon the goods from Troy to Detroit, and refused to surrender them to the owner until reimbursed the amount; in an action of replevin for the goods it was held, that the owner was entitled to possession of the goods, without payment of the freight advanced by F.[8]

3. A common carrier, who innocently receives goods from a wrong-doer, without the consent of the owner, express or implied, has no lien upon them for their carriage, as against such owner;[9] not even for freight which he has paid to a previous carrier, by whom the owner had directed them to be carried.[10] And a lien for freight, where it exists, can only be asserted by the party in whose favor it was created, or some one acting, in privity with such party; but such lien presents no obstacle to a recovery, by the general owner of the goods, against a mere wrong-doer.[11]

4. Mr. Justice *Fletcher*, in delivering the opinion of the court, in the case just cited,[9] alludes to the fact that so little is found in the books upon this point, and the dictum, in York *v.* Grenaugh,[12] by

[7] Hill *v.* Leadbetter, 42 Me. 572; *ante*, n. 3.

[8] Fitch *v.* Newberry, 1 Doug. (Mich.) 1. So, too, if the carrier detains the goods for the payment of a sum beyond the freight, the owner being ready to pay freight, he and his agents are liable in trover, and in such case it is not requisite to make a formal tender of freight. Adams *v.* Clark, 9 Cush. 215; Isham *v.* Greenham, 1 Handy, Sup. Court R. 357.

[9] Robinson *v.* Baker, 5 Cush. 137.

[10] Stevens *v.* Boston & Worcester Railroad, 8 Gray, 262.

[11] Ames *v.* Palmer, 42 Maine, 197.

[12] 2 Lord Raym. 866, where it was held that an innkeeper might detain a horse for his keep, although put at the stable by one who came wrongfully by him. But that case differs from a carrier, as the innkeeper cannot ordinarily demand pay in advance.

Lord Chief Justice *Holt*, that in the case of the Exeter carrier, it was held that where one who stole goods delivered them to a carrier, who transported them by his order, the carrier thereby acquired a lien upon the goods for the freight, and that this had been adopted by some of the elementary treatises, and by the courts even, *arguendo*, sometimes,[13] and after referring to the case of Fitch *v.* Newberry, thus continues : —

5. "This decision is supported by the case of Buskirk *v.* Purington, 2 Hall, 561. There property was sold on a condition which the buyer failed to comply with, and shipped the goods on board the defendants' vessel ; on the defendants' refusal to deliver the goods to the owner, he brought trover, and was allowed to recover the value, although the defendants insisted on their right of lien for the freight.

6. "In the case of Saltus *v.* Everett,[14] it is said, 'The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser, under a defective title, cannot hold against the proprietor.' There is no case to be found, on any reason or analogy anywhere suggested in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently."

7. "The reason, and the only reason given, is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrong-doer. He is bound only to receive goods from one who may rightfully deliver them to him. And he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods unless the freight is first paid to him, and he may in all cases secure the payment of the carriage in advance.

8. "Upon the whole the court are satisfied that upon the adjudged cases, as well as on general principles, no right of lien for freight can grow out of a wrongful bailment of the goods to the carrier." In a recent English case it was held, that where carriers

[13] King *v.* Richards, 6 Wharton, 418. The court held here that the carrier might lawfully deliver the goods to the rightful owner, and defend against the claim of the bailor, or his assignee, for value, on that ground.

[14] 20 Wend. 267, 275.

receive goods to be carried, there is no estoppel precluding them from disputing the title of the bailor. To trover by such a bailor it is an answer that the carriers have delivered the goods to the true owner at his request.[15]

9. The carrier of passengers has a lien for his charges upon the baggage, but not upon the person of the passenger.[16]

10. And neither carriers nor warehousemen have any lien upon goods for a general balance of account against the owner,[17] more than in other cases of lien.

11. As we have said, this lien may be waived by delivery of the goods and the other usual modes of waiving liens, as by accepting security for the freight on time, or where, by the terms of the contract of carriage, the carrier is not to receive pay at the time of the delivery of the goods.[18]

12. And where the carrier is induced to deliver the goods to the consignee by a false and fraudulent promise of the latter that he will pay the freight as soon as they are received, the delivery will not amount to a waiver of the lien, but the carrier may disaffirm and sue the consignee in replevin.[19]

13. In general the last carrier may detain the goods, not only till his charges, but until all the charges during the transit, are paid. If this is not settled by law, in any place, the custom and course of trade may be shown.[20] And in such case, and in all cases of lien for freight, if the goods be delivered without exacting payment of the dues, the owner is liable to the party entitled to demand the same, whether they consist of sums due for services, or advances

[15] Sheridan *v.* New Quay Co., 4 C. B. (N. S.) 618; s. c. 5 Jur. (N. S.) 248.

[16] Story on Bailm. § 604; Wolf *v.* Summers, 2 Camp. 631; McDaniel *v.* Robinson, 26 Vt. 316.

[17] Rushforth *v.* Hadfield, 6 East, 519; Hartshorn *v.* Johnson, 2 Halst. 108; Green *v.* Farmar, 4 Burr. 2214; Leonard's Ex'rs *v.* Winslow, 2 Grant Cas. 139. And in Hale *v.* Barrett, 26 Ill. 195, it was held, that where goods belonging to different owners are shipped by one bill of lading, the consignee cannot hold the goods of one for the charges upon the goods of the other. If a warehouseman or consignee deliver goods upon the receipt of a promissory note of the owner for charges, he loses his lien. Ib.

[18] Crawsay *v.* Homfray, 4 B. & Ald. 50.

[19] Bigelow *v.* Heaton, 6 Hill, 43; s. c. 4 Denio, 496. See also Hays *v.* Riddle, 1 Sandf. 248.

[20] Lee *v.* Salter, Lalor's Supp. to H. & Denio, 163. This lien includes all charges during the transit of warehousemen and forwarders. See also Cooper *v.* Kane, 19 Wend. 386; Dawson *v.* Kittle, 4 Hill, 107, as to the effect of usage.

for the services of other parties, made in the due course of business.[21] But this only extends to charges strictly connected with the expense of transportation.[22]

14. Neither the carrier, nor any other bailee having a lien, can sell the goods, at common law, in satisfaction of the lien. The appropriate remedy, in such case, is in equity.[23]

16. Payment of freight to a common carrier for the portion of a consignment delivered is no presumptive evidence, either of the delivery of the remainder of the consignment, or of release from liability on that account. The consignee in such case has an option, either to set off the loss against the freight, or pay freight and sue for the goods not delivered.[24]

16. But where the consignee declines accepting the goods, on the ground that the charges are unreasonable, or for any other cause, when the carrier is not in fault, he must still keep the goods safely for a reasonable time at least. And where they were, under such circumstances, immediately returned to the consignor, in a remote place, it was held the carrier was liable for the damages sustained, and there being a count in trover, it is intimated that such act amounts to a conversion.[25]

17. But the law gives no right to add to a lien upon a chattel a charge for keeping it till the debt is paid, when it is detained against the will of the debtor.[26]

18. A warehouseman, with whom goods carried by a railway company, are stored, may retain possession of the same, where so instructed by the company, until the back charges thereon are paid.[27]

[21] Jones *v.* Pearle, 1 Strange, 556; Pothonier *v.* Dawson, 1 Holt, N. P. C. 383; 2 Kent, Comm. 642; Hunt *v.* Haskell, 24 Maine, 339.

[22] Steamboat Virginia *v.* Kraft, 25 Mo. 76.

[23] Fox *v.* McGregor, 11 Barb. 41; Jones *v.* Pearle, 1 Strange, 556, and cases *supra*, n. 21.

[24] Moore's Ex. *v.* Patterson, 28 Penn. St. 505.

[25] Crouch *v.* Great Western Railw., 31 Law Times, 38; s. c. 2 Hurl. & Nor. 491.

[26] Somes *v.* The British Empire Shipping Co., 8 Ho. Lds. 338; s. c. 6 Jur. (N. S.) 761, affirming the decision of the Queen's Bench and the Exchequer Chamber. This was the case of a ship detained till repairs paid, and the claim was for the use of defendants' dock during the term the ship was detained.

[27] Alden *v.* Carver, 13 Iowa, 253. But the carrier cannot insist upon payment of freight before he allows the consignee to inspect the goods. Lanata *v.* Grinnell, 12 La. Ann. 24.

19. If an injury occurs, or any loss ensues, by reason of the first carrier, to whom the owner's instructions were communicated, not fully or understandingly, carrying them through the route, as he should have done, as if the goods are in consequence sent to a wrong place, this will not exonerate the owner from responsibility for the charges of transportation by the subsequent carriers, or affect the validity of their lien, for such charges as they have themselves earned, or advanced to the other companies from the point of original departure.[28]

20. But common carriers acquire no such lien upon goods transported for the national government, as to justify their detention.[29]

21. If the owner of the goods accept them at any intermediate place short of the original destination, he will be liable to pay freight *pro rata*.[30] And where the carrier pays for the loss of the goods it is equivalent to delivery, and he is entitled to deduct freight.[31]

22. The consignee who is ready to pay freight may maintain trover for the goods for a refusal to deliver them, there being no other legal claim upon them, and he is not bound first to make a formal tender of the freight.[32]

23. Where the consignee indorsed the bill of lading to the wharfinger, but not so as to pass the property, in these words: "Deliver to A. or order, looking to him for all freight without recourse to us:" and the ship-owners accepted the indorsement and delivered the goods accordingly, it was held they could not sue the consignee for freight.[33] A mere agent to receive the delivery of goods for another is not personally responsible for freight.[34]

[28] Briggs *v.* Boston & Lowell Railw., 6 Allen, 246. And the fact that there is a compact among all the connecting lines for each successive carrier to deliver to the next and receive his own freight and advances, will not render the last carrier responsible for any default of the former carrier. Darling *v.* Boston & Worcester Railw. 11 Allen, 295; Carson *v.* Harris, 4 Greene (Iowa), 516; Wilson *v.* Harvey, 32 Penn. St. 270.

[29] Dufolt *v.* Gorman, 1 Minn. 301.

[30] Lorent *v.* Kentring, 1 Nott. & McC. 132.

[31] Hammond *v.* McClurg, 1 Bay, 101. [32] Adams *v.* Clark, 9 Cush. 215.

[33] Lewis *v.* McKee, Law Rep. 2 Exch. 37. See also Frye *v.* Chartered Mercantile Bank, Law Rep. 1 C. P. 689. But a bill of lading, providing for payment of freight by the consignee on delivery, does not release the consignor. Christy *v.* Row, 1 Taunt. 311; Collins *v.* Union Co., 10 Watts, 384. Both consignee and consignor may be liable. Cock *v.* Taylor, 13 East, 399.

[34] Amos *v.* Temperly, 8 M. & W. 798.

24. A lien for freight is waved by unconditionally delivering the goods, on the bill of lading, and allowing the larger portion to be placed upon another ship for a foreign port, the assignee being in good credit. And the waiver is not avoided by his estate subsequently proving insolvent.[35] But in the case of the Bags of Linseed[35] it was held that if the goods are placed in the hands of the consignee with an understanding that the lien for freight is to continue, a court of admiralty will regard it as a deposit of the goods in warehouse, and not as an absolute delivery; and will regard the ship-owner as still constructively in possession sufficiently to preserve his lien. It therefore seems that, as in other cases of lien, a waiver will be presumed from an unconditional delivery.[35]

25. Delivery of part of the cargo will not operate as a waiver of the lien upon the portion not delivered.[36] Where goods are shipped for distinct voyages, having different termini, the lien for one voyage does not extend to the other.[36] It is for the jury to say, whether there has been a complete delivery.[36]

26. A contract to pay what is called dead freight, for the portion of the ship not filled, creates no lien upon the goods sent, for the deficiency.[37] The owner of the ship, chartered for the voyage, has no lien for the hire of the vessel,[38] because he parts with the possession of it to another, who is *pro hac vice*, the owner. But where the terms of the charter-party are such, that the owner, in construction of law, retains possession of the vessel, and the charterer only secures a special mode of compensation for freight, the owner's lien continues upon the freight to the extent of his interest.[39]

27. A carrier cannot by general notice secure a lien for the general balance of account of freight, so as to bind the goods, coming in the name of a factor, for his balance as against the gen-

[35] Sears *v.* Wills, 4 Allen, 212; Bags of Linseed, 1 Black, 108.

[36] Bernall *v.* Pim, 1 Gale, 17.

[37] Phillips *v.* Rodie, 15 East, 547. See Small *v.* Moates, 9 Bing. 574.

[38] Hutton *v.* Bragg, 7 Taunt. 14. But an express contract for lump freight was held to secure a lien upon the cargo. Kern *v.* Deslandes, 10 C. B. (N. S.) 205.

[39] Christie *v.* Lewis, 5 Moore, 211; s. c. 2 Brod. & B. 410; Saville *v.* Campion, 2 B. & Ald. 503. When part of the freight is payable in bills on time, the lien continues till the delivery of the bills. Yates *v.* Mennell, 2 Moore, 297; Same *v.* Milk, id. 278; Same *v.* Railston, id. 204. But not for the payment of the bills. Gilkison *v.* Middleton, 2 C. B. (N. S.) 134; Tamvaco *v.* Simpson, Law Rep. 1 C. P. 363.

eral owner of the goods.[40] And a general usage or custom to retain all goods for a general lien, for and in the name of the persons for whom the warehouse-keepers are retained and employed, for all balances of account for all advances or expenses for payment of duties, customs, freight, and other charges for conveying, entering, bonding, and warehousing the goods, was held an unreasonable and unjust custom, and one that could not be maintained in law.[41]

28. Where the carrier, without demanding freight, stores the goods as his own, it has been treated as a conversion.[42] And where he or his appointee sells the goods without authority, and the purchaser claims the goods as his own, without setting up the claim of freight, it was held, he could not insist upon any such deduction from the value of the goods. But questions of this character are affected very much by the special circumstances and the good faith of the parties.[42]

29. The carrier's lien for freight does not attach upon the loading of the goods on board, or until the voyage is entered upon.[43] Nor does it attach where by special contract between the parties the time of payment is delayed beyond the time of the delivery of the goods.[44] And where the carrier, under such circumstances, sold the goods at auction for the freight, it was held to be a conversion.[44] And where by the terms of the contract no lien for freight exists, a court of law cannot give one.[45]

30. As the delivery of the goods and the payment of freight are concurrent acts, and the carrier parts with his lien upon delivery, it is proper for him to refuse delivery, except upon the payment of freight, from day to day and time to time, as the delivery is made.[46] The *bona fide* assignee of the bill of lading, having no knowledge of any claim for freight except that named in the bill, is entitled to the delivery of the goods on the payment of the freight named therein.[47] But a railway corporation do not waive their lien for

[40] Wright *v.* Snell, 5 B. & Ald. 350.

[41] Leukart *v.* Cooper, 3 Scott, 521; s. c. 3 Bing. N. C. 99.

[42] Everett *v.* Saltus, 15 Wend. 474.

[43] Burgess *v.* Grove, 3 Har. & G., 225; Clemson *v.* Davidson, 5 Binn. 392.

[44] Chandler *v.* Baldwin, 18 Johns. 157; Gracie *v.* Palmer, 8 Wheaton, 605.

[45] Kirchner *v.* Venus, 12 Moore, 361; How *v.* Kirchner, 11 id. 21.

[46] Paynter *v.* James, Law Rep. 2 C. P. 348; Black *v.* Rose, 2 Moore, P. C. (N. S.) 277.

[47] *Pollock*, Ch. B., in Foster *v.* Colby, 3 Hurl. & Nor. 715.

freight upon a cargo of coal, by placing it in bins upon their own land adjoining that of the owners, and allowing them to take from the bin, from time to time, and deliver to their customers.[48]

31. Where the contract for freight is for a stipulated sum, each day, between two points, taking in and putting out freight, at certain specified places, it was held, the carrier had a lien upon the goods remaining on board at the return of the boat, for all the freight earned during the day.[49]

32. If the carrier claims a lien upon goods for dead freight, and also for actual freight, and to detain the goods until both are paid, this will dispense with a tender for the actual freight, when that alone is held valid; and the carrier is liable for conversion without the tender of the sum actually due, that being deducted from the amount of the damages.[50]

SECTION XXIII.

Time of Delivery.

1. *Carrier must deliver goods in a reasonable time, or according to his contract.*
2. *Delay caused by unusual press of business, will not make carrier liable.*
3. *Or the loss of a bridge from an unusual freshet.*
4. *Carriers excused by the custom and course of the navigation.*
5. *Two companies using the same line, one not liable for delay caused by negligence of the other.*
6. *Mode of proof in actions for injury to goods.*

§ 189. 1. In the absence of a special contract, the carrier is bound to perform his duty; *i. e.* deliver the goods at their destination, or, at the end of his route, to the next carrier, in a reasonable time, according to the usual course of his business, with all convenient despatch.[1] And if the carrier or his servant, within the scope of

[48] Lane *v.* Old Colony Railw., 14 Gray, 149.

[49] Fuller *v.* Bradley, 25 Penn. St. 120.

[50] Kerford *v.* Mondell, 5 Hurl. & Nor. 931.

[1] Raphael *v.* Pickford, 5 M. & G. 551; Broadwell *v.* Butler, 6 McLean, 296. But what is reasonable time is a question of fact, depending upon the circumstances of the case. Ib. Nettles *v.* S. C. Railway, 7 Rich. 190; id. 409; *ante*, § 167; Conger *v.* Hudson Riv. Railw., 6 Duer, 375. And the carriers are not justified in adopting a particular mode of forwarding the goods and thereby delaying the delivery, merely because that is the usual mode adopted. Hales *v.* London & Northwestern Railw. Co., 8 L. T. (N. S.) 421; s. c. 4 B. & S. 66. Nor can the carrier, who contracts to transport goods upon the Missouri River, by steamboat, within a reasonable time, excuse delay, on the ground of such a fall of the

his employment and duty, enter into any special contract to deliver in any particular time or place, even beyond the terminus of his particular route, it will be binding, and the owner, it would seem, may recover damages, with reference to expected profits, had the goods been delivered in time.[2] And the acceptance of goods by the consignee at a place short of their destination will not excuse the carrier from responsibility for damages incurred by breach of his contract of affreightment.[3] Nor will the acceptance of a part

water as to render navigation with his own boats impracticable, provided other smaller boats continue their trips with safety. Collier *v.* Swinney, 16 Mo. 484. The delivery of the goods at the end of the transit must be in a reasonable time, place, and manner. Hill *v.* Humphreys, 5 W. & S. 123; Favor *v.* Philbrick, 5 N. H. 358. If the fault of the defendant hinders the delivery of the cargo, the owner of the vessel is entitled to the hire, as upon a full delivery. Bradstreet *v.* Baldwin, 11 Mass. 229. A contract to carry in conformity to directions to be given at an intervening port, implies a duty to give such directions in a reasonable time after arrival at that port. Woolley *v.* Reddlelien, 5 Man. & G. 316. An embargo, being laid upon navigation at an intervening port, only excuses the carrier during its continuance, and he is then bound to complete the voyage, although the embargo had continued for two years. Hadley *v.* Clarke, 8 T. R. 259.

[2] Wilson *v.* York, Newcastle, & Berwick Railw., 18 Eng. L. & Eq. 557; Hughes *v.* G. W. Railw., 14 C. B. 637; s. c. 25 Eng. L. & Eq. 347. But in Boner *v.* The Merch. Steamboat Co., 1 Jones (N. C.), 211, it is said that the obligation upon carriers, by which they become insurers, does not extend to the time of delivery. Parsons *v.* Hardy, 14 Wendell, 215; Story on Bailm. 545 *a*. See, also, upon this point, Sangamon & Morgan Railw. *v.* Henry, 14 Ill. 156; Kent *v.* Hudson River Railw., 22 Barb. 278; Lipford *v.* Charlotte & South Carolina Railw., 7 Rich. 409, and Nettles *v.* Same, id. 190; Harmony *v.* Bingham, 2 Kernan, 99; 1 Duer, 209, where it is held, that if the party enter into a contract to deliver goods within a specified time, he cannot excuse himself by showing delay caused by inevitable necessity; and this is undoubtedly the established rule of law upon this subject, and in regard to all analogous subjects, where the party makes an absolute contract, not providing for any contingency or excuse. Angell on Carriers, § 294. See Nudd *v.* Wells, 11 Wis. 407.

But in Bridgman *v.* Steamboat Emily, 18 Iowa, 509, where the defendants refused to perform their contract to carry goods from Council Bluffs to St. Louis, and gave no excuse for the refusal, or any proof that plaintiffs might readily have obtained transportation otherwise, the defendants were held responsible for the difference in the price of the goods at the two points, at the time they should have arrived, deducting the agreed price of carriage.

And in general, the proper measure of damages in an action for not delivering goods at the place of destination according to the contract or legal duty of the carrier, is the difference in the value of the goods between the place of receipt and delivery. Bracket *v.* McNain, 14 Johns, 170; Amory *v.* McGregor, 15 id. 24; O'Connor *v.* Forster, 10 Watts, 418.

[3] Atkisson *v.* Steamboat Castle Garden, 28 Mo. 124.

afford any excuse for not delivering the residue.[4] And where the consignee refuses to accept the goods, it is the duty of the carrier to take such course as he deems most for the interest of the owner, having also proper regard to the security of his own charges; and if he adopts such a course as men of common prudence would, he is not responsible for consequences.[5] The consignee may at any time dispense with the mode of delivery adopted by the consignor, and the contract between the consignor and the carrier, as implied by law, without any special stipulations, will be to deliver to the consignee at his place of business, unless he shall otherwise order.[6] And if the carrier, instead of delivering to the consignee, keep wheat at the station, and it is injured by remaining so long in the bag, the carrier will not be responsible to the consignor for the loss.[6]

2. But, if the carriers, being a railway company, make no special contract to deliver in any particular time, and a delay happen in the transportation, in consequence of an unusual press in business, the company having a reasonable equipment for all ordinary purposes, and the goods being carried with as much expedition as is practicable under the circumstances, they are not liable for damages.[7]

[4] Cox *v.* Peterson, 30 Alabama, 608.

[5] Steamboat Keystone *v.* Moies, 28 Mo. 243.

[6] London & Northwestern Railw. *v.* Bartlett, 7 H. & N. 400; s. c. 5 L. T. (N. S.) 399. This was a case where wheat was sold to be delivered at the consignee's mill, and forwarded accordingly, and, on its arriving at the station two miles from the mill, it was kept there, in consequence of instructions by the consignee that wheat arriving for him should not be forwarded without his written order. And the consignee, having examined the wheat at the station, refused to accept it, and while it remained there it became deteriorated in quality and value. It was held, the consignor had no right of action against the carrier for not delivering the wheat at the mill, as the non-delivery was by order of the consignee, s. c. 8 Jur. (N. S.) 58. See also Baker *v.* Steamboat Milwaukee, 14 Iowa, 214. The property as between consignor and consignee depends upon the contract of the parties and not upon any inflexible rule of law.

[7] Wibert *v.* The New York & Erie Railw., 19 Barb. 36; s. c. 2 Kernan, 245. In this case it is said, the measure of damages in such cases is not necessarily the difference in prices at the time it should have been delivered and that at which it was delivered. Galena & Chicago Railw. *v.* Rae, 18 Ill. 488.

But it is said in this case, that the company taking grain from wagons, in preference to taking it from private warehouses, is no unjust discrimination. But if the company's servants unjustly give preference to one party over others, in regard to transportation, they will be liable for all damage; and the company

3. But where the delay in transportation happened in consequence of the loss of one of the company's bridges, by an unusual freshet, and in the mean time the price of the goods depreciated in the market, it was held that the company were not liable, this being the act of God. It was held, that for any injury to the goods, during the delay, the company are liable.[8]

4. But the falling of the water in the Ohio River, preventing a boat passing up the falls with its cargo, was held not to come strictly within the exception to the carriers' responsibility. But proof of a long-established usage, uniform and well known, to allow boats, in such cases, to wait a month or more for the rise of water, without incurring liability for not delivering their cargo in a reasonable time, under the usual bill of lading, with "the privilege of reshipment," is admissible. And it was held, that such delay did not deprive the owner of the right to recover full freight.[9] But a carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts, or incur extra expense, in order to surmount obstructions caused by the act of God, as a fall of snow.[10] It is said in a recent English case,[11] that in the absence of special agreement there is no implied contract on the part of a railway company to deliver with punctuality, but the contract is rather to carry safely and deliver within a reasonable time.

5. Where one company, by agreement under a general act of parliament, confirmed by special act, had running powers over another company's line, and the traffic on the line was delayed by a collision caused by the negligence of the servants of the accessory line, it was held that the company owning the line were not chargeable with any default, by reason of the delay in the delivery of goods caused by such collision.[11]

6. In an action against a carrier for damage done to goods carried, it is enough to prove the good condition of the articles when

must receive freight according to their usual custom, even when that is effected by means of running their cars upon a side track and taking wheat from a private warehouse.

[8] Lipfold *v.* The S. C. Railw., 7 Rich. 409. But see *ante*, § 188, n. 3. See also The May Queen, Newberry's Adm. 464.

[9] Broadwell *v.* Butler, 6 McLean, 296.

[10] Briddon *v.* Great Northern Railw., 28 L. J. 51; 32 L. T. 94.

[11] Great Northern Railw. *v.* Taylor, Law. Rep. 1 C. P. 385; s. c. 12 Jur. (N. S.) 372.

put into his possession and their deteriorated state when received from him. And any damage resulting from bad package will go to lessen the amount of damage.[12]

SECTION XXIV.

Carriers have an Insurable Interest in the Goods.

1. *Carriers may insure for their own benefit.*
2. *A warehouseman or wharfinger may insure and recover the full value of the goods in trust.*
3. *Carriers not responsible for loss by fire, may insure in trust, and recover the full value.*
4. *The consignee in a bill of lading may be shown to have no insurable interest.*
5. *Running insurance, on time, apportioned.*

§ 190. 1. As carriers become insurers of all goods which they carry against fire or marine disaster, except from inevitable accident, there can be no doubt they have, to that extent, an insurable interest in the goods, and it has been so held.[1] And this insurable interest continues, so long as the liability of the carrier continues, even where they employ other carriers.[1]

2. And a warehouseman or wharfinger with whom goods are deposited has an insurable interest in such goods, although there has been no previous authority given by the general owners to insure, nor any notice given to them of the insurance. Such goods are properly described in a policy as goods "in trust." The insured in such case are entitled to recover the full value of the goods destroyed by fire, but are accountable to the general owners for the excess of the amount so received above their own

[12] Higginbotham *v.* Great Northern Railw. Co., 2 F. & F. 796. And in an action against carriers for injury to casks of oil alleged by them to have arisen from defects in the casks, it was left to the jury whether it arose from such defects, and whether, if it did, the carriers knew or ought to have known of it, and acted negligently in sending them on in that state. Cox *v.* London & Northwestern Railw. Co., 3 F. & F. 77.

[1] Chase *v.* Washington Mutual Insurance Company of Cincinnati, 12 Barb. 595. But the carrier has the right, by express contract, to except risks from fire, or any other cause, from his undertaking, and in such case he is not liable for loss by the excepted risk. Parsons *v.* Monteath, 13 Barb. 353. But upon general principles the first carrier is liable for loss by fire, while the goods are in a float, changing to the next carrier. Miller *v.* Steam Nav. Co., 13 Barb. 361.

interest in the goods, which in this case extended only to the charges of warehousing.[2]

3. And common carriers may insure goods in their possession, as carriers, describing them as " goods in trust as carriers," and such an insurance will cover the whole value of the goods, and if the goods are destroyed by fire the carrier will be entitled to recover of the insurer their full value, and it will make no difference that under the statute, or by special contract, the carriers were not responsible for losses by fire.[3]

4. But the fact that one is named as consignee in a bill of lading is not conclusive proof that he has in his own right an insurable interest. It may still be shown that he was a mere agent.[4] But unquestionably a factor or broker to whom goods are consigned by the bill of lading may insure in his own name for whom it may concern, and thus recover to the full extent of any insurable interest which he fairly represented.

5. Where a carrier upon a canal effected an insurance for twelve months, for £10,000, upon goods on board thirty boats named between London, Birmingham, &c., backwards and forwards, with leave to take in and discharge goods at all places on the line of navigation; it was held that the policy was not exhausted, when once goods to the value of £10,000 had been carried on all the boats, or by each of them, but that it continued throughout the year, to protect all the goods afloat, at any one time, up to the amount insured, and that upon the loss of goods on board any one of the boats the assured was entitled to recover the proportion of the loss that £10,000 bore to the whole amount of the goods carried during the year.[5]

[2] Waters *v.* The Monarch Life & Fire Ins. Co., 5 El. & Bl. 870; s. c. 34 Eng. L. & Eq. 116. "The carrier being responsible for the safe custody and due transportation of the goods, may recover the full value of the goods and hold the same in trust for the owner. *Clifford*, J., in the Propeller Commerce, 1 Black (U. S.), 574, 582. And in cases of insurance for the benefit of carriers, it is a sufficient allegation of interest in the subject-matter that the insurance was for the benefit of the plaintiff, as carrier, without alleging that he had paid the owner of the goods their value, or for his interest therein. Van Natta *v.* Security Ins. Co., 2 Sandf. S. C., 490. The shipper, too, named in a bill of lading, may recover of the carrier for any injury to the goods, although he has no property, general or special, in the goods. Blanchard *v.* Page, 8 Gray, 281.

[3] The London & Northwestern Railw. *v.* Glyn, 1 Ellis & Ellis, 652.

[4] Seagrave *v.* Union Marine Ins. Co., Law Rep. 1 C. P. 305.

[5] Crowley *v.* Cohen, 3 B. & Adolph. 478.

SECTION XXV.

Rule of Damages and other Incidents of Actions Against Carriers.

1. *Damages, for total loss, are the value of the goods at the place of destination.*
2. *Goods only damaged, owner bound to receive them, and the amount of damage.*
3. *Upon evidence of servants' unfaithfulness or negligence, some explanation must be given, or the company held liable.*
4. *Company liable for special damages, where they act* malâ fide.
5. *But not ordinarily liable for special damage.*
6. *Consignor owning the goods the proper party to sue.*
7. *Consignor in such case not estopped by the act of consignee.*
8. *Actions may be brought in the name of bailee or agent.*
9. *Recovery in such cases bars the claim of general owner.*
10. *Where general property in consignee, he should sue.*
11. *Preponderating evidence must be given.*
12. *How far a deviation is a conversion.*

§ 191. 1. The general rule of damages, in actions against carriers, where the goods are lost or destroyed, by any casualty, within the range of the carrier's responsibility, is sufficiently obvious. It must be the value of the goods at the place of destination.[1] And this will commonly include the profits of the adventure.[2] In a well-considered English case,[3] Lord *Tenterden*, Ch. J., thus lays

[1] Hand *v.* Baynes, 4 Wharton, 204; Grieff *v.* Switzer, 11 Louis. An. 324. See also Taylor *v.* Collier, 26 Ga. 122; Dean *v.* Vaccaro, 2 Head, 488; Davis *v.* N. Y. & Erie Railw., 1 Hilton, 543; Mich. &c. Railw. *v.* Carter, 13 Ind. 164. See Harris *v.* Panama Railw., 3 Bosworth, 7, where it is held, that in an action against a carrier to recover the value of property destroyed through his negligence, during its transit, at a place where such property has not been the subject of traffic, or has not been bought and sold, the measure of his liability is the fair value of the property at or near the place of its destruction. But, in determining such value, it would seem that the jury may take into consideration the fact that the property has a market value, at a place other than that where it was destroyed, and to which it was destined, and towards which the carrier, in the course of the usual and regular communication with such place, was then taking it, in connection with the hazards and expenses attendant upon the residue of the intended voyage. See also Spring *v.* Haskell, 4 Allen, 112.

[2] Sedgwick on Damages, 356.

[3] Brandt *v.* Bowlby, 2 B. & Ad. 932. See also Gillingham *v.* Dempsey, 12 S. & R. 183; Ringgold *v.* Haven, 1 Cal. 108. Trover will not lie against the carrier, or any other bailee, for mere neglect of duty. There must be an actual conversion, or a refusal to deliver on proper request. Bowlin *v.* Nye, 10 Cush.

down the rule: "The damages ought to be the value of the cargo, at the time when it ought to have been delivered, that is, at the port of discharge." *Parke*, J., said, "The sum it would have fetched, at that time, is the amount of loss sustained by the non-performance of the defendants' contract." But in another case,[4] where the goods were destroyed at the port of shipment, and before the voyage was entered upon, without the fault of the carrier, it was held he was only responsible for the value of the goods at that port, and no interest should be added even after suit brought.

2. But where the goods are only damaged, the owner is still bound to receive them, and cannot abandon, and go against the carrier as for total loss.[5] But whether the owner have accepted the goods, or not, he may recover for any deterioration they have sustained, unless by the excepted risks in the carrier's undertaking.[6]

3. In an action against a carrier, slight evidence having been given that the porter of the carrier stole the goods, and the jury having found for the plaintiff, a new trial was denied, on the

416; Opinion of court in Rome Railw. *v.* Sullivan, 14 Ga. 283; Robinson *v.* Austin, 2 Gray, 564.

[4] Lakeman *v.* Grinnell, 5 Bosw. 625. And where the carrier is guilty of unreasonable delay in the transportation, the decline of the price of the goods, in the mean time, is proper to be considered in estimating damages. Weston *v.* Grand Trunk Railw., 54 Me. 376; Sisson *v.* Cleveland & Is. Railw., 14 Mich. 489; Henderson *v.* Ship Maid of N. O., 12 La. Ann. 352. But where goods were sent by railway to plaintiffs' traveller, at C., and failed to arrive before he left, through the fault of the company, it was held that the profits of any expected sale at C. could not be included in the damages. Great Western Railw. *v.* Redmayne, Law Rep., 1 C. P. 329.

[5] Shaw *v.* South Carolina Railw., 5 Rich. 462. So also, where the goods are not delivered in a reasonable time, the owner can only recover damage of the carrier. Scoville *v.* Griffith, 2 Kernan, 509; Hackett *v.* C. B. & M. Railw., 35 N. H. 390. Where part only of the goods are injured, the carrier is liable only for that part, nor is his liability enhanced by failure to offer to deliver the uninjured part. Mich. &c. Railw. *v.* Bivens, 13 Ind. 263. Where a portion of goods shipped by one entire contract of affreightment is lost by fault of the carrier, and the residue is sold by him by the bill of lading at the port of delivery without knowing such loss, the carrier, if sued by the consignee for money had and received from the proceeds of the sale, cannot deduct the freight, but may deduct a discount allowed by him to the purchaser on discovering the deficiency in the goods. Stevens *v.* Sayward, 8 Gray, 215.

[6] Bowman *v.* Teall, 23 Wendell, 306.

ground that the carrier did not offer the porter as a witness.[7] And in an action against a railway for negligence, if the plaintiff show

[7] Boyce *v.* Chapman, 2 Bing. (N. C.) 222. And upon general principles the plaintiff makes a *prima facie* case, by showing that the goods did not reach their destination. Story on Bailm. § 529 *a*; Woodbury *v.* Frink, 14 Ill. 279; Bennett *v.* Filyaw, 1 Florida, 403; Bark Oregon, Newberry's Adm. 504; Brig May Queen, id. 464. But where the carrier has, by notice, or special contract, limited his responsibility as a common-carrier, the burden of proof of showing negligence is upon the consignee, the same as in ordinary suits, charging neglect of duty. Ib. But where the bill of lading states the goods to have been shipped in good order, and they arrived in a damaged state, the burden of proof is upon the carrier, to show that the damage occurred by causes for which by the bill of lading he was not responsible. The Propeller Cleveland, id. 221. And where in such case, the carrier shows the existence of facts from which this could be fairly inferred, it devolves upon the shipper to show that the damage might have been prevented by the exercise of ordinary care and skill on the part of the carrier. Ib.

And where the carrier at first wrongfully refused to deliver goods consigned to a manufacturer, but afterwards delivered them, it was held that he was not liable for consequential damages, from the delay of the consignee's works, or the consequent loss of profits, but only for the expense of sending a second time for the goods. Waite *v.* Gilbert, 10 Cush. 177. Perhaps the manufacturer was entitled to some consideration, by way of damages, until he could have supplied himself in other ways, with similar materials, if indispensable for his present use. But to recover such special damages, which are not the natural or ordinary result of the act complained of, it is probably necessary in strictness, to declare specially. But in a late case in the Court of Exchequer, for not carrying a passenger according to the carrier's duty and contract, it was held that no such remote and accidental damages are recoverable, in any form. Hamlin *v.* Great Northern Railw., 1 H & N. 408; s. c. 38 Eng. L. & Eq. 335. See *post*, § 199, n. 2. But in a very late English case, Mullett *v.* Mason, Law Rep. 1 C. P. 559; s. c. 12 Jur. (N. S.) 321, where the plaintiff bought of the defendant a cow, on the assurance of the latter that he would warrant her, and that she had come off his father's farm, and it proved to be a foreign cow, and in a few days died of the cattle plague, and thereby caused the death of other cows belonging to plaintiff, it was held that he might recover the value of other cows so lost. And in a recent case in Admiralty, Dr. *Lushington* allowed the master his expenses in defending himself in a foreign port against a charge of murder brought against him by two of the crew whom he had justly chastised on the voyage, and for £10 paid as the penalty of the recognizance required of him on his acquittal to prosecute the men for perjury, but which he elected to forfeit in order to continue his voyage. The allowance was made on the ground that the master was entitled to the expenses of his defence, as the charge originated directly from the performance by the master of his duty to the owners in chastising the men; and also that it was for the interest of the owners that the master should forfeit his recognizances, and not be delayed in returning with the vessel. The James Seddon, Law Rep. 1 Adm. & Ecc. 62; s. c. 12 Jur. (N. S.) 609. But in the case of Gee *v.* Lan-

damage, resulting from an act of defendants, he makes a *prima facie* case, and the defendant must show that he was in the exercise of the requisite degree of care, or else that such a state of circumstances existed as rendered all exercise of care unavailing, and this is so although the act complained of is one, which, with proper care, does not ordinarily produce damage.[8]

4. In a late English case,[9] it is held, that if a railway company omit to deliver bundles of packed parcels, in time, with a view to injure the plaintiff's business, as a collector of parcels, and thereby create a monopoly in themselves, they will be liable to the special damage resulting therefrom, but not otherwise.

5. Where a plan and models sent to compete for a prize were lost by the carriers, it was held, the proper measure of damages is the value of the labor and materials expended in making the articles, and not damages from losing the chance of obtaining the prize; the latter being too remote.[10]

cashire & Yorkshire Railw. Co., 3 Law T. (N. S.) 238; s. c. 6 H. & N. 211, where an action was brought against a carrier for delay in delivering goods, when there was no special contract, and the judge directed the jury to find a certain sum for the wages of the plaintiff's servants, who were kept out of employment by the non-arrival of the goods; and also left it to the jury to name the amount the plaintiff should recover for the loss of profits for the same cause, it was held to be a misdirection, on the authority of Hadley *v.* Baxendale, 9 Exch. 341. The cases are somewhat numerous of late in the English courts, where the carrier, who acts in good faith and fails to deliver goods in such time as he might have done with proper diligence and therefore ought to have done, is held not liable for speculative loss of expected profits, but only for the particular loss upon the article thus failing to be delivered in proper time. Wilson *v.* Lancashire & Yorkshire Railw. Co. 9 C. B. (N. S.) 632; s. c. 7 Jur. (N. S.) 862; Collard *v.* Southeastern Railw. Co., 7 H. & N. 79; s. c. 7 Jur. (N. S.) 950; Simmons *v.* Southeastern Railw. Co., 7 H. & N. 1002; s. c. 7 Jur. (N. S.) 849; Rice *v.* Baxendale, 7 H. & N. 96. If there is no market at the place of delivery, the jury may give the cost of the articles, and reasonable expenses and profits. O'Hanlan *v.* Great Western Railw. Co., 6 B. & S. 484. See also Tardos *v.* Ship Toulon, 14 La. Ann. 429. And the owner of baggage lost by a railway company, while he was a passenger, can only recover the value of the things lost, and nothing for expenditure, consequent upon the loss. New O. Railway *v.* Moore, 40 Miss. 39; C. & Ch. Railw. *v.* Marcus, 38 Ill. 219.

[8] Ellis *v.* Portsmouth & Raleigh Railw., 2 Iredell, 138.

[9] Crouch *v.* Great Northern Railw., 11 Exch. 742.

[10] East Anglian Railw. *v.* Lythgoe, 10 C. B. 726. But where the owner of the goods sustains special damage, by reason of the goods being rendered unfit for the particular use for which they were procured, the jury may consider how much they are lessened in value thereby, and give damages accordingly. Hack-

6. The consignor, who owns the goods, and sustains the injury from the damage or loss, is the proper party to bring the action against the carrier.[11] In an action against the carrier for the loss of the plaintiff's goods, it is no answer that the goods were delivered to the defendant by one who, as consignor, claimed compensation for the loss, and that the defendant paid him as such consignor, without notice that he was not the owner of the goods.[12] The decision here seems to go upon the ground that there was nothing in the case to indicate that the consignor was the owner of the goods; or that he was allowed to represent the plaintiff in any such way as naturally to mislead the defendants. It is unquestionably the duty of the carrier to see that he delivers goods to the party entitled, and if he do not, although he be misled by a gross fraud, or even by a forged order, he is not excused, but is liable in trover.[13] And by parity of reason, if the goods are lost the carrier should, before he pays any one, ascertain whether the property of the goods was in him; otherwise he would pay in his own wrong, if it should turn out the property was in another, since the contract, by construction, is with the party entitled to claim the goods.

ett *v.* B. C. & M. R., 35 N. H. 390. And where machinery was sent to Vancouver's Island to erect a mill, and on the delivery, one of the cases was missing, and its place had to be supplied by sending to England, it was held that only the value of the missing machinery with the expense of procuring it, could be recovered, and nothing for loss by reason of the mill not going sooner into operation. British Columbia Saw-mill Co. *v.* Nettleship, Law Rep. 3 C. P. 499.

[11] Sanford *v.* Housatonic Railw., 11 Cush. 155; Coats *v.* Chapin, 2 Q. B. 483; Freeman *v.* Bird, id. 491, in n.; Sargent *v.* Morris, 3 B. & Ald. 277. But the consignee is *prima facie* the owner of the goods, and in the absence of proof to the contrary, will be so regarded. Arbuckle *v.* Thompson, 37 Penn. St. 170; Potter *v.* Sawing, 1 Johns. 215; The Merrimack, 8 Cranch, 317. On an assignment for the benefit of another, the assent of the latter will be presumed. Grove *v.* Brien, 8 How. (U. S.) 429; Ashmead *v.* Borie, 10 Penn. St. 254. And it is here said, the consignee may accept the goods at an intermediate port or place. And as a general rule the delivery of goods by the vendor to the carrier, on behalf of the vendee, is a delivery, in law, to the vendee; and he alone can maintain an action against the carrier for non-delivery. Dutton *v.* Solomonson, 3 B. & P. 582; Jacobs *v.* Nelson, 3 Taunt. 423. The action must, as a general rule, be in the name of the owner of the goods. Law *v.* Hatcher, 4 Blackf. 364. But see Goodwyn *v.* Douglas, Cheves, 174.

[12] Combs *v.* Bristol & Exeter Railw., 3 H. & N. 1.

[13] Ostander *v.* Brown, 15 Johns. 39; Hawkins *v.* Hoffman, 6 Hill, 588; Powell *v.* Myers, 26 Wendell, 591, *Bronson*, J.; Clarke *v.* Spence, 10 Watts, 337, *Rogers*, J.

And whether it be the consignor or consignee, will depend upon circumstances readily learned upon inquiry.[14] A warehouseman is regarded in the light of a middle-man, and may even dispute the title of the party delivering goods to him, and in defence of an action of trover show that the title is in some third party, who has forbidden the goods being delivered to the bailor.[15] This may be at variance with some of the old cases, and with much which may be found in the elementary books; but it is consistent with reason and justice, and will not be found embarrassing in practice with one qualification, that the bailee of goods will be permitted to set up the *jus tertii* in his own defence, when he is so situated as to be made responsible to such party in case of a recovery by the present claimant, unless he do so urge the claim of such other party in his own defence. Such a state of the case will occur always where the third party has demanded the thing of the bailee and forbid his delivering it to the bailor; and also where the bailment is so made as to create a trust in behalf of the real owner, or party justly entitled to demand possession.[15]

7. A receipt for the goods, by the consignee, acknowledging to have received them in good order, and in which he is requested to notice any errors therein, in twenty-four hours, or the carrier will consider himself discharged, does not estop the consignor, from suing the carrier for damage of the goods, although no notice thereof was given the carrier.[11]

8. Actions against carriers may be brought in the name of bailees, or agents, who have the rightful custody of the goods, and who make the bailment, or in the name of the owner.[16]

[14] *Watson*, B., in Coombs *v.* Bristol & Exeter Railw., 3 H. & N. 1.

[15] Thorne *v.* Tilbury, 3 Hurls. & N. 534. See cases cited in the argument of this case. Where the owner of the goods induces the carrier to carry them for a less price by representing them of inferior value, he can only recover the amount he represented their value to be, in case of loss or damage. McCance *v.* London & Northwestern Railw. Co., 7 H. & N. 477; 7 Jur. (N. S.) 1304; s. c., affirmed in Exchequer Chamber, 10 Jur. (N. S.) 1058; 3 H. &. C. 343. See also Robinson *v.* London & Southwestern Railw. Co., 19 C. B. (N. S.) 51; s. c. 11 Jur. (N. S.) 390.

[16] Elkins *v.* Boston & Maine Railw., 19 N. H. 337; White *v.* Bascom, 28 Vt. 268. See Wing *v.* N. Y. & E. Railw., 1 Hilt. 235. *Semble*, where a contract is made with a railway company to carry goods to a given point, and while *in transitu* the goods are reshipped by that company upon another road, the latter company would be liable directly to the owner for a loss of the goods through their neglect. Illinois Central Railw. *v.* Cowles, 32 Ill. 116.

9. But it is well settled, that a recovery for the goods, of the first or any subsequent carrier, in the name of any one having either a general or special property in the goods, in an action properly instituted, will be a bar to any subsequent suit against the same person, at the suit of another party, having either a general or special property in the goods.[17]

10. Where the general property in the goods vests in the consignee, upon delivery to the carrier, the consignor has ordinarily no property remaining, even where he pays the freight.[18]

11. In the trial of actions against carriers, where the goods or baggage pass over successive lines of transportation, it has been held insufficient evidence to charge the first carrier to show the delivery of the goods to him, and the failure of their arrival at the place of destination, thus leaving the case without any preponderating evidence to show that they were not delivered to the second carrier.[19]

12. It has been held, that if the carrier deviate from the regular route, and the goods are lost, it is a conversion.[20] This may be sound law, provided there is no just occasion to depart from the ordinary route, and the deviation consequently shows a wanton abuse of the bailment, but otherwise it could only render the carrier responsible for any damage which should accrue. And where goods coming from a foreign country and which are dutiable are consigned to an agent for the mere purpose of securing the payment of the duties, the carrier, having knowledge of the limited character of the agency, will not be justified in changing the destination of the goods, upon the direction of such person, and if he do so, is guilty of a conversion.[21]

[17] White *v.* Bascom, 28 Vt. 268; Green *v.* Clark, 13 Barb. 57; s. c. 2 Kernan, 343.

[18] Green *v.* Clark, *supra*. And where a box containing jewelry was delivered to a carrier by a servant under instructions from both plaintiffs, the box being the property of one of them, and the jewelry being their joint property, but was addressed to one of them only at a specified place, it was held there was evidence of a joint bailment by both plaintiffs. Metcalfe *v.* L. B. & So. Coast Railw., 4 C. B. (N. S.) 307, 317; 31 Law T. 166.

[19] Midland Railw. *v.* Bromley, 17 C. B. 372; s. c. 33 Eng. L. & Eq. 235. In general the carrier is liable upon proof of loss or deficiency in the goods upon arrival at their destination unless he give exculpatory evidence. Hawkes *v.* Smith, 1 Car. & M. 72. But it must clearly appear that the missing goods were actually contained in the trunk or package when delivered to the carrier. McQuesten *v.* Sanford, 40 Me. 117.

[20] Phillips *v.* Brigham, 26 Ga. 617.

[21] Claflin *v.* Boston & Lowell Railw., 7 Allen, 351.

SECTION XXVI.

Demurrage.

1. *The nature of the claim.*
2. *Damages in the nature of demurrage.*
3. *A carrier has no lien upon the cargo for any claim in the nature of demurrage.*

§ 191 *a*. 1. Demurrage is a claim by way of compensation for the detention of property which is subsequently restored. As where a ship and cargo were detained by an illegal seizure, and discharged without ultimately obtaining a certificate of probable cause, the owner was held entitled to damages by way of demurrage for the detention of the ship, and interest upon the value of the cargo.[1] So also, where by the established regulations of a railway, demurrage was charged on sacks furnished for transportation of grain, after the expiration of fourteen days; but by another of the regulations of the company none of the company's sacks containing grain were allowed to leave any station after having reached their destination, unless a guaranty is first obtained from the consignee that the sacks shall be returned.

2. Although demurrage, strictly speaking, is only due when expressly stipulated for in the contract for affreightment, yet where the vessel is detained an unreasonable time in unlading, the owner may recover damages, in the nature of demurrage, for such detention. But in such action the owner or charterer of the ship would only recover compensation for the time the vessel was unreasonably delayed, and not for consequential damages in consequence.[2]

3. A railway has no lien for the compensation impliedly due them for the detention of their cars an unreasonable time, in discharging the cargo, the cars remaining during the time in a public highway.[3]

[1] The Apollon, 9 Wheaton, 362.
[2] Clendaniel *v.* Tuckerman, 17 Barb. 184.
[3] Crommelin *v.* New York & Harlem Railw., 10 Bosw. 77.

SECTION XXVII.

Common Carriers of Freight or Passengers by Water. Peculiarities of their Rights and Duties.

1. *Covenants in a charter-party will be construed as independent and not conditions precedent, where that can fairly be done.*
2. *Freight stipulated to be carried for so much the cubic foot is to be estimated at the time of shipment.*
3. *The owner of a ship responsible to freighters so long as he continues actually in possession of the ship, either by himself or the master and seamen.*
4. *The delivery of goods and payment of freight concurrent acts. The carrier not bound to deliver until the consignee is ready and willing to pay freight.*
5. *How far common carriers of goods or passengers may recover* pro rata itineris.
6. *The shipper, whether the owner of the goods or not, is always primarily liable to the carrier for freight, and the latter is not obliged to refuse to deliver goods until the freight is paid, unless he so stipulate.*
7. *If the carrier deliver the goods to the consignee without exacting freight, trusting to the consignor, he cannot afterwards assert any such claim on the bankruptcy of the consignor.*
8. *How far carriers of passengers by water are liable to actions for not furnishing satisfactory subsistence.*
9. *The captain in such cases cannot justify excluding a passenger from the saloon table, unless he conducts disorderly, so as to disturb the quiet and comfort of others, at table.*
10. *How far carriers are responsible for goods damaged or lost by being stowed upon deck.*
11. *The carrier is bound to know or learn the laws and regulations of the port of destination, and conform thereto; and if he failed to do so, is responsible for the consequences.*
12. *How far passenger carriers by water, will be excused for refusing to carry obnoxious persons to places where their presence might probably excite riot; or in sending them back to the place of departure, from considerations of prudence and humanity.*

The responsibilities and duties of common carriers by water do not differ essentially from those attaching to the same class of persons, in other modes of transportation, except as the modes of receiving and discharging freight, necessarily, or according to convenient usages, modify them. And it will be the purpose of the present section to point out these modifications, and some very few peculiarities attaching to passenger transportation by water.

§ 191 *b*. 1. In charter-parties, as well as in other contracts, covenants will be construed as independent and not as conditions precedent, if that can fairly be done, as in the case of a stipulation to proceed to a certain place and there take in a cargo, and the ship deviated slightly, and this operated to the disadvantage of the

freighter. But it was held not to avoid the contract, and that the freighters were bound to furnish the cargo,[1] and liable to an action for refusing to do so.

2. A contract to carry a cargo at the rate of "$7.55 per ton of 50 cubic feet delivered, the freight to be paid on right delivery of the cargo," is to be construed as applying to the freight at the time of delivery. And if, being cotton, and being subject to high hydraulic pressure, according to the usual practice, it should considerably expand before arriving at its point of destination, that will not entitle the carrier to any additional compensation.[2]

3. Where a ship under a charter-party, is advertised as a general ship, and one consigns goods, without knowing of the existence of the charter-party, and the ship remains in the possession of the owners by their master and servants, the same as before the charter-party, it was held such person might recover of the owners the same as if no charter-party existed.[2] Where a charter-party provided there should be no liability for detention of the ship by ice, and it was necessary to use lighters in loading the vessel, and lighterage was delayed by ice, it was held there was no liability for the detention.[3]

4. As we have already seen,[4] the delivery of the cargo and the payment of freight are to be regarded as concurrent acts, and the carrier by water, who stipulates in the bill of lading for the payment of freight "on right delivery of the cargo," is not obliged to deliver the goods until the consignee is ready and willing to pay the freight.[5] And where the consignee declined to pay freight until the goods were placed in his store, the master stored the goods in a warehouse, subject to his own order, and gave notice to the consignee; on a libel against the vessel for non-delivery of the goods, to which the ship-owners pleaded non-payment of freight, it was held they were not responsible for the misconduct of the warehouseman, while the goods were in his possession.[6] A contract for freight is an entire contract, and not apportionable.

[1] McAndrew *v.* Chapple, Law Rep. 1 C. P. 643.

[2] Buckle *v.* Knoop, Law Rep. 2 Exch. 125, 333.

[3] Sandermen *v.* Scurr, Law Rep. 2 Q. B. 86; N. Haven S. B. Co. *v.* Vanderbilt, 16 Conn. 420.

[4] Hudson *v.* Ede, Law Rep. 2 Q. B. 566; S. P. in The Great Eastern, Law Rep. 2 Adm. & Eccl. 88.

[5] Paynter *v.* James, Law Rep. 2 C. P. 348.

[6] The Eddy, 5 Wallace, 481.

5. And where by the terms of a charter-party the defendants covenanted to pay so much as freight of goods delivered at A., it was held that freight could not be recovered *pro rata itineris*, if the ship was wrecked short of her destination at A., although the defendant accepted his goods at the place where the ship was wrecked.[7] It is the duty of the carrier in such case, either to repair his ship or procure another, and perform the voyage, when he will be entitled to freight under the contract.[8] But although the carrier cannot recover upon the special contract, without proving full performance on his part, the acceptance of the goods by the owner short of their ultimate destination, will generally be regarded as implying the assent on his part to pay freight, ratably for the portion of the carriage performed. But the action should not be brought upon the original contract, without alleging the subsequent modification by the acceptance of the goods short of their original destination.[8] And the same general rules seem to have been applied to the question of passage-money, where the passage fails to be performed. The carrier cannot retain the whole passage-money or maintain an action for it, unless he carry the passenger to his destination; nor can he retain or recover *pro rata itineris*, unless he have performed beneficial service, and then not upon the original contract, but upon a *quantum meruit*, or on the ground of the newly given assent of the passenger to terminate the contract after part performance.[9] Freight *pro rata itineris* is never due unless the owner of the cargo voluntarily receive it, at a place short of its destination.[10] And where the carrier declines to repair his ship or procure another to forward the goods, the acceptance of the same by the shipper is not to be regarded as altogether voluntary.[10] But the expense of overland transportation, after the goods have been unconditionally received by the consignee at an intermediate port, must be borne by him.[11] The reservation in the bill of lading of the right of re-shipment of the goods, does not discharge or affect the responsibility of the carrier

[7] Cook *v.* Jennings, 7 T. R. 381.

[8] *Lawrence*, J., in Cook *v.* Jennings, *supra*. See also Luke *v.* Lyde, 2 Burrow, 882, and the comments upon the same. Rossiter *v.* Chester, 1 Doug. (Mich.) 154.

[9] Mulloy *v.* Backer, 5 East, 316; Leman *v.* Gordon, 8 C. & P. 392.

[10] Caze *v.* Baltimore Ins. Co. 7 Cranch, 358; Welch *v.* Hicks, 6 Cow. 804.

[11] Reed *v.* Dick, 8 Watts, 479.

for the safe delivery of the goods.[12] And where one buys a passage ticket for a particular steamer, which had been at the time lost at sea, without the knowledge of the parties, the holder of the ticket can only recover the amount paid for it.[13]

6. It seems to be well settled, that where goods are shipped in the ordinary mode, by bill of lading, it will be regarded as an express contract on the part of the shipper, to pay the freight to the carrier, unless the same is paid by the consignee or some other one, although the shipper is not the owner, and the carrier is not obliged to retain the goods until the freight is paid, unless he so stipulate. The usual provision in such contracts, that he may do so, is regarded as intended exclusively for the benefit of the carrier, and one which he may waive, at his election, and rely upon his remedy against the shipper.[14] But it is held that the party who obtains goods under a bill of lading impliedly stipulates to pay the freight.[15] But this is merely a cumulative remedy in favor of the carrier.[16] And it was accordingly held,[17] that where, by the charter-party, the ship was to deliver goods in London, on the payment of freight, and by the bills of lading the goods were stipulated to be delivered to the shipper or his assigns, he or they paying freight as per charter-party; and some of the goods were sold and the bills of lading assigned to the defendant, before the arrival of the goods, and the portion sold defendant, upon arrival in London were entered at the custom-house and docks in the name of the defendant, he paying the duties and dues, and obtaining possession of the goods under the bill of lading and indorsement, that no contract was by law implied on the part of the defendant to pay freight; that was matter of fact to be judged of by the jury from all the facts and circumstances attending the sale. This decision of the Queen's Bench was affirmed in the Exchequer Chamber, that court holding that if such a contract

[12] Little *v.* Simple, 8 Mo. 99; Whitesides *v.* Russell, 8 Watts & S. 44.

[13] Bonsteel *v.* Vanderbilt, 21 Barb. 26.

[14] Wooster *v.* Tarr, 8 Allen, 270; 8 Gray, 281, 286, 291–295; Shepard *v.* DeBernales, 13 East, 565; Domett *v.* Beckford, 5 B. & Ad. 521–525; Christy *v.* Row, 1 Taunt. 300. The opinion of *Bigelow*, Ch. J., in the case of Wooster *v.* Tarr, presents the law on this point in a very satisfactory manner. See also Barker *v.* Havens, 17 Johns. 234; Layng *v.* Stewart, 1 Watts & S. 222.

[15] Dougal *v.* Kemble, 3 Bing. 383.

[16] *Bigelow*, Ch. J., in Wooster *v.* Tarr, *supra*.

[17] Sanders *v.* Vanzeller, 4 Q. B. 260.

were implied or inferred from the facts, no action of *indebitatus assumpsit* could be maintained. But if the bills of lading had not referred to the charter-party, so as to be in some sense qualified by it, but had merely stated that the goods were to be delivered to the consignee or his assigns on their paying freight, the taking of the goods under the indorsement would have been evidence from which a jury might have inferred a contract to pay freight; but even in such a case no such contract would arise by mere implication of law, and consequently *indebitatus assumpsit* would not lie. The court refused to award a *venire de novo*, and affirmed the judgment for the defendant. And in a later case,[18] it was held that the liability of the consignee or indorser of the bill of lading for freight, in such cases, is not the result of the original contract of affreightment but of a new contract, the consideration for which is the delivery of the goods to him at his request.

7. But where the carrier delivers the goods to the indorsee of the bill of lading, without exacting from him the payment of freight, and debits the same to the consignor or shipper, he cannot, after the bankruptcy of the latter, assert a claim for freight, either against the goods or the party to whom he delivered them.[19]

8. Questions have sometimes arisen, in passenger transportation by water, where the subsistence is naturally supplied by the carrier, in regard to the extent of departure from what might be regarded comfortable fare which will subject the carrier to an action. That must depend altogether upon circumstances, and how far the carrier puts in proper supplies and furnishes such subsistence as might fairly have been expected, under the circumstances. And it is so much the practice of passengers to find fault with their fare, upon voyages of any considerable extent, when the difficulty is more in themselves than anywhere else, that the courts have not, as a general thing, manifested much readiness to listen to complaints of this character. The demands of passengers, far re-

[18] Kemp *v.* Clark, 12 Q. B. 647. See also Holt *v.* Wescott, 43 Me. 445; Fox *v.* Nott, 6 Hurl. & Nor. 630.

[19] Tobin *v.* Crawford, in Exchequer Chamber, 9 M. & W. 716. So if the carrier trust to the consignee for freight he cannot fall back upon the consignor because the consignee becomes bankrupt, before the payment of the freight, he being ready to pay it at the time of receiving the goods, but the party appointed in the bill of lading to receive the same not being present to receive it. Thomas *v.* Snyder, 39 Penn. St. 317.

moved from land, and without any sound and healthy appetites, are often very absurd, or, at least, unreasonable. It was accordingly said,[20] that in an action against the captain of a ship, for not furnishing good and fresh provisions to a passenger on a voyage, the jury must be satisfied that there has been a real grievance sustained by the plaintiff; that he has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he is therefore to have a right of action against the captain, who does not provide all that he ought. The passenger must have sustained a real grievance, and not one that is mainly imaginary.

9. Questions sometimes have arisen, in the English courts, how far the captain of a passenger ship may justify excluding a passenger from the table, in the caddy or saloon, and require him to take his meals in his own apartment, on the ground of ungentlemanly manners or conduct. Such questions would not be likely to occur either there or here, at the present day, unless from the excessive use of stimulus, or passionate excitement of some kind. Where a passenger behaves as well as he knows how, it is all that can be required. If he still fails to meet the demands of the average standard of factitious refinements, in social intercourse, he is less in fault, often, than the framers of such senseless dogmas as disgust rather than edify. But if he makes a brute of himself, either by drink or passion, he becomes an unfit companion of sober men, and may properly be required not to come among them.[21] If the carrier improperly exclude the husband from table, and the wife prefers on that account to take her meals with her husband, it will be regarded as an improper exclusion of both, and the carrier responsible accordingly.[21]

10. It seems that carriers are responsible for damages occurring to goods by reason of being stowed on deck in tempestuous weather, unless such stowage be authorized by custom or the consent of the shipper.[22] And so also, where the carrier improperly stows the goods on deck, whereby a portion of them is lost, he cannot recover for the freight of the remainder, provided the portion lost was of greater value than the freight due.[23] But if the car-

[20] Young *v.* Fewson, 8 C. & P. 55.

[21] Pendergrast *v.* Compton, 8 Car. & P. 454.

[22] Barber *v.* Brace, 3 Conn. 9; Smith *v.* Wright, 1 Caines, 43.

[23] Waring *v.* Morse, 7 Alab. 343.

rier is not in fault in regard to stowage of goods on deck, that being done by the consent or express contract of the owner of the goods, he cannot be compelled to contribute for the jettison of the goods.[24] But where the goods are laden upon deck, according to the custom of a particular trade, the owner of the ship is held responsible for contribution to the owner of the goods, for their loss.[25] So, where goods are thrown overboard in order to save the ship and the remainder of the cargo, and that is effected, it is equitable and in conformity with the rules of law, that both the ship and the cargo thus saved, should contribute to the loss on the basis of general average.[26] And where goods of a particular description are, in conformity with a notorious custom, stowed in a particular way, shippers who consider such mode of stowage hazardous, must notify carriers of their desire to have a different one adopted, or they will not be entitled to charge the carrier with damages received in consequence of it.[27]

11. If the carrier, in consequence of non-compliance with the regulations of the port, expose the goods to forfeiture, he thereby becomes responsible to the owners. It is the duty of the carrier, and his servants and agents, in making delivery at the port of destination, to learn the laws and regulations there in force, and make the delivery in conformity therewith, so as not only to land the goods, but to do it in such a legal manner as to place them within the power of the consignees.[28]

12. The following case is of sufficient importance to justify stating at length. Although a common carrier of passengers at sea, as the master of a steamship, may properly refuse a passage to a person who has been forcibly expelled by the actual, though violent and revolutionary authorities of a town, under threat of

[24] Dodge *v.* Bartol, 5 Greenl. 286.

[25] Gould *v.* Oliver, 4 Bing. (N. C.) 134.

[26] Rossiter *v.* Chester, 1 Doug. (Mich.) 154. This rule of the maritime law, as enforceable in the courts of admiralty, is here fully recognized; but on the ground that the case occurred upon the lakes, where at that time the admiralty jurisdiction did not obtain (although it is otherwise now, by act of Congress), it was held the claim was not enforceable in the courts of common law. See also Lawrence *v.* Minturn, 17 How. (U. S.) 100, where the general subject of the liability of other parties and interests to contribute to a necessary loss by jettison is thoroughly discussed, and the authorities learnedly and extensively commented on.

[27] Baxter *v.* Leland, 1 Abbott's Adm. 348.

[28] Howland *v.* Greenway, 22 How. (U. S.) 491.

death if he return, and when the bringing back and landing of such passenger would, in the opinion of such master, tend to promote further difficulty, yet such refusal should precede the sailing of the ship. If the passenger have violated no inflexible rule of the ship in getting on board the vessel, have paid or tendered through himself or a friend, the passage money, and have conducted himself properly during the voyage, the master has no right, as matter of law, to stop a returning vessel, put him on board of it, and send him back to the port of departure. And if he do so, damages will be awarded against him on proceedings in admiralty. However, where a person who had been thus banished from a place, got on board a vessel going back to it, determined to defy the authorities there and take his chance of life, and the captain, who had not known the circumstances of the case until after getting to sea, on meeting a return steamer of the line to which his own vessel belonged, stopped his own and sent the man on board the returning vessel to be taken back to the place of departure, such captain, not acting from any malice, but from a humane motive, and under the belief that the passenger would be hanged if landed at the port to which his own vessel was going, in such a case, the apprehended danger mitigates the act, and the damages must be small. Accordingly, the Supreme Court, on appeal from a decree giving the plaintiff four thousand dollars, modified it by directing that the damages must be reduced to fifty dollars, and moreover ordered that each party should pay his own costs on the appeal. In such a case a passenger is entitled to compensation for the injury done him by being put on board the returning vessel, so far as that injury arose from the act of the captain of the other vessel in putting him there. But he is not entitled to damages for injuries from obstructions which he afterwards met in going to the place from which he had been expelled, and to which he desired to return; and which injuries were not caused by the act of this captain, but were owing to the fact that all to whom he afterwards applied for passage to that place, were aware of the power and determination of the authorities there, and therefore refused to carry him back.[29]

[29] Pearson *v.* Duane, 4 Wall. (U. S.) 605.

CHAPTER XXVII.

COMMON CARRIERS OF PASSENGERS.

SECTION I.

Degree of Care required.

1. *Are responsible for the utmost care and watchfulness.*
2. *Duty extends to every thing connected with the transportation.*
3. *But will not extend to an insurance of safety.*
4. *Will make no difference, if passenger does not pay fare.*
5. *So too where the train is hired for an excursion, or is under control of state officers.*
6. *Not easy to define the degree of care required.*
7. *Passenger carriers not responsible for accidents without fault.*
8. *They contract only for their own acts.*
9. *They must adopt every precaution in known use.*
10–11, *and notes. Further discussion of the rule and the cases.*
12. *Duty to inform passengers of peril requiring caution to escape.*
13. *Person purchasing a ticket becomes a passenger, and is entitled to protection on reaching his seat in the carriages.*
14. *Passenger carriers bound to exclude disorderly persons from their carriages.*
15. *Company bound to fence its stations so as to hinder passengers entering by a dangerous way.*
16. *A passenger carrier who attempts to carry ordinary passengers and soldiers at the same time, is responsible for the consequences.*

§ 192. 1. It is agreed on all hands that carriers of passengers are only liable for negligence, either proximate or remote, and that they are not insurers of the safety of their passengers, as they are as common carriers of goods and of the baggage of passengers. The rule is clearly laid down in one of the early cases,[1] by *Eyre*, Ch. J., that carriers of passengers "are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been *no* negligence or default in the driver." — "It is said he was driving with reins so loose that he could not readily command his horses; if that was the case the defendants are liable; for a driver is answerable for the *smallest negligence*." This is now the settled rule upon the subject, as applicable to all modes

[1] Aston *v.* Heaven, 2 Esp. 533; s. p. Frink *v.* Potter, 17 Ill. 496. See also Munroe *v.* Leach, 7 Met. 274.

of carrying passengers, by those who hold themselves out as public or common carriers of passengers.[2]

2. And the obligation of care and watchfulness extends to all the apparatus by which passengers are conveyed.[3] In this last case it is said: "The obligation of a stage proprietor, in regard to carrying passengers safely, has reference to the team, the load, the state of the road, as well as the manner of driving." In another case the rule is somewhat more elaborated,[4] by *Best*, Ch. J.: "The action cannot be maintained unless negligence be proved, and whether it be proved is for the determination of the jury. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. *If there be the least failure in one of these things* the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." The rule of care and diligence thus laid down has been very generally adopted in this country.[5] The fact that injury was suffered by

[2] Christie *v.* Greggs, 2 Camp. 79; Harris *v.* Costar, 1 C. & P. 636; White *v.* Boulton, Peake's C. 81; Sharp *v.* Gray, 9 Bing. 457. Passenger carriers owe a higher degree of diligence and watchfulness toward passengers than toward strangers. State *v.* Baltimore & Ohio Railw., 24 Md. 84.

[3] Taylor *v.* Day, 16 Vt. 566; Curtis *v.* Drinkwater, 2 B. & Ad. 169. See Sales *v.* Western Stage Co., 4 Clarke (Iowa), 541.

[4] Crofts *v.* Waterhouse, 3 Bing. 319. A very similar rule is adopted in Farrish *v.* Reigle, 11 Gratt. 697. The defect in this case was the blocks being out of the brakes, which caused the coach to press upon the horses so that they could not control it, and in consequence it was upset and the plaintiff injured.

The coach-owner, or his servants, must examine his coach before each trip, or he is chargeable with negligence if any accident happen through defect of the coach. And if any irregularity is pointed out, the driver must look to it immediately. Brenner *v.* Williams, 1 C. & P. 414, *Best*, Ch. J.

[5] Boyce *v.* Anderson, 2 Pet. (U. S.) 150; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 192; Fuller *v.* Naugatuck Railw., 21 Conn. 557; Hall *v.* Conn. River Steamboat Co., 13 Conn. 319; Camden & Amboy Railw. *v.* Burke, 13 Wend. 611, 626; McKinney *v.* Neil, 1 McLean, 540; Maury *v.* Talmadge, 2 McLean, 157; Stockton *v.* Frey, 4 Gill, 406; Hollister *v.* Nowlen, 19 Wend. 236; Derwort *v.* Loomer, 21 Conn. 245. But a passenger carrier is not responsible for any loss or expense of the passengers consequent upon quarantine regulations. New Orleans *v.* Windermere, 12 La. Ann. 84. See Alden *v.* N. Y. Central Railw., 26 N. Y. 102, where the company were held liable for an injury resulting

any one while upon the company's trains as a passenger, is regarded as *prima facie* evidence of their liability.[6]

from a crack in the axle of a car, undiscoverable by any practicable mode of examination.

The rule in Connecticut was first settled, in 13 Conn. 326, that carriers of

[6] *Denman*, Ch. J., at Nisi Prius, in Carpue *v.* London & B. Railw., 5 Q. B. 747; Laing *v.* Colder, 8 Penn. St. 479, 483; Galena & Chicago Railw. *v.* Yarwood, 15 Ill. 468, 471; Hegeman *v.* Western Railw., 16 Barb. 353, 356; Holbrook *v.* Utica & Schen. Railw., 16 Barb. 113; Curtis *v.* Rochester & Syracuse Railw., 20 Barb. 282.

The same rule had obtained in actions against carriers of passengers by coaches. 13 Pet. (U. S.) 181. See Skinner *v.* L. B. & South Coast Railw., 5 Exch. 787; s. c. 2 Eng. L. & Eq. 360, to same effect.

But in Holbrook & Wife *v.* Utica & Schen. Railw,, 2 Kernan, 236, the court seem to deny that a presumption of negligence arises in all cases of injury to passengers. In this case the wife's arm, while in the window of the car, was broken by something coming in contact with the car in passing stationary carriages of the company on another track. The court say, in cases of this kind, the burden of showing negligence is upon plaintiff, and the presumption is an inference of fact for the jury, from the cause of the injury and the circumstances attending.

The case of Hegeman *v.* Western Railw., 16 Barb. 353, was where the plaintiff had sustained an injury by the breaking of an axle-tree while he was a passenger in defendants' cars, and it was claimed to be neglect in the company in not providing safety-beams to their cars, and it was held, that evidence might be received to show the utility of the invention, and that it was proper to submit the question of negligence to the jury under proper instructions. The court say: "Whether the engine or car, which is placed upon the road for the purpose of carrying passengers, has been manufactured at its own shops," . . . or purchased of other manufacturers, "the company is alike bound to see, that in the construction no care or skill has been omitted for the purpose of making such engine or car as safe as care and skill can make it." It was held to afford no presumption against the negligence of the company, that they had selected their servants with care with reference to their competency, or that the act, by which the plaintiff sustained injury, was done without the sanction of the company. Gillenwater *v.* Madison & Indianapolis Railw., 5 Ind. 340; Farish *v.* Reigle, 11 Gratt. 697. And in a late case (Alden *v.* N. Y. Central Railw., Am. Railw. Times, Feb. 4, 1865), it is reported that the court held the company responsible for a defect in the axle-tree of a car, which was not discoverable without taking the car to pieces, a passenger being injured in consequence.

In Galena & Chicago Railw. *v.* Yarwood, 17 Ill. 509; s. c. 15 Ill. 468, it is held, that a passenger in a railway car need only show that he has received an injury, to make a *prima facie* case against the carrier; the carrier must rebut the presumption, in order to exonerate himself. Negligence is a question of fact, which the jury must pass upon. Persons in positions of great peril are not

3. So, too, evidence that the cars did not stop at a way station the usual time, and that a passenger is injured in getting out, is

passengers are "bound to the highest degree of care that a reasonable man would use." This has been adhered to in all the subsequent cases, and is sub-

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required to exercise all the presence of mind and care of a prudent, careful man, under ordinary circumstances; the law makes allowance for them, and leaves the circumstances of their conduct to the jury. See Albright *v.* Penn, 14 Texas, 290.

In Frink *v.* Potter, 17 Ill. 406, it was held, the proprietor of a stage-coach is liable for an injury to a passenger, which resulted from the breaking of an axle-tree by the effect of frost. If the carrier knew, or might have known, by the exercise of extraordinary care and attention, that danger would result from using a coach in the manner and under the circumstances, and the danger could have been avoided, he is liable.

And if such danger exists as cannot be avoided, and so imminent as to deter prudent men from encountering it in their own business, the carrier should, it would seem, refuse to proceed, or he will be liable for the consequences. Passengers should not be pushed into inevitable danger, without being consulted. But if, being informed, they choose to incur the hazard, probably it should be regarded as their own misfortune if they suffer damage in spite of the best efforts of the carrier and his servants.

In Laing *v.* Colder, 8 Penn. St. 483, it was held, that where passengers in a railway car are liable to have their arms caught in passing bridges if lying out of the windows, it is the duty of the conductors of the train to give such notice to them as will put them effectually on their guard, or the company are liable for all such injuries, and that it is not sufficient to trust to printed notices put up in the cars. But in regard to such perils as ordinarily attend railway travelling, and which must be apparent to all passengers of common experience, like passing from car to car, or standing upon the platforms, when the train is in motion, it is probable that general notice would be sufficient, and a passenger, who voluntarily exposes himself to extraordinary peril, having no necessity or excuse for doing so, should not be allowed to recover for damage thereby accruing. But if he have a necessity for doing so, and damage accrue in consequence of the negligent conduct of the train, he ought not, perhaps, to be precluded from a recovery.

See also Christie *v.* Griggs, 2 Camp. 79; Ware *v.* Gay, 11 Pick. 106; Stockton *v.* Frey, 4 Gill, 406; Nashville & Chat. Railw. *v.* Messino, 1 Sneed, 221.

In 3 Kernan, 9, the case of Hegeman *v.* Western Railw., is affirmed by the Court of Appeals, and the proposition in regard to the liability of the company for defects in their cars being the same, whether they manufacture them or purchase them of others, which is extracted from the opinion of the Supreme Court above, is distinctly reaffirmed by the Court of Appeals. *Denio*, J., dissenting.

The Court of Appeals recognize the rule of care and diligence, to which we have before alluded, that its extent is to be measured by the known perils to which passengers are exposed, and that something more is required in railway transportation than in carrying passengers by coaches.

Gardiner, Ch. J., says: "That although the defect was latent, and could not

good evidence against the company in an action to recover for the injury.[7] In an action for damages sustained by a passenger on a

stantially the same as the English rule, and as that adopted in the other States, and in the United States Supreme Court, 13 Pet. (U. S.) 190, where Mr. Justice

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be discovered by the most vigilant external examination, yet if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter is responsible."

And in Curtiss *v.* Rochester & Syracuse Railw., 20 Barb. 282, where the injury occurred from a misplacement of the rails, a collision being caused thereby, it was held the company were bound to see that the rails were in the right position, and not to trust exclusively to the lever of the switch, when the rails were in open view, while moving it, and also to see that the rails were firmly secured, and for want of these things they were guilty of negligence; that evidence that the switch was placed right did not rebut all presumption of negligence; that it was a question for the jury, under all the facts and circumstances.

So also the company were held liable where the injury occurred from coming in contact with an animal upon the track, which might have been seen early enough to stop the train, and where the train was moving at an unreasonable rate of speed, and no signal given, or effort made to arrest the speed. N. & C. Railw. *v.* Messino, 1 Sneed, 220. And where a passenger in an omnibus was injured by the bursting of a lamp, it was held to be incumbent upon the carrier to show by affirmative proof that the fluid used in the lamp was a safe and proper article for such uses. Wilkie *v.* Butler, 3 E. D. Smith, 327. The fact of an animal being upon the track is *prima facie* evidence of negligence in the company, they being bound as between themselves and their passengers to keep the road free from all obstructions of that character. Sullivan *v.* Philadelphia & Reading Railw., 30 Penn. St. 234; *post*, § 204 *a*, n. 1. But in Curtis *v.* Rochester & Syracuse Railw., 18 N. Y. 534, it is said that no *prima facie* presumption of negligence in the carrier results from the injury merely, but only when it appears that it resulted from some defect in the road or equipment.

Where the company give notice under the statute that they will not hold themselves responsible for injury to passengers caused while standing on the platforms, such notice being posted up in the cars, it affords no ground to presume that the company waived the notice because the conductor did not warn the passenger to leave the platform. Higgins *v.* New York & Harlem Railw., 2 Bosw. 132. See also Chicago, Burlington, & Quincy Railw. *v.* George, 19 Ill. 510. The fact that a train was running several hours out of time, is presumptive evidence of gross negligence. Ib.

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[7] Fuller & Wife *v.* Naugatuck Railw., 21 Conn. 557. It is said in Southern Railw. *v.* Kendrick, 40 Miss. 374, that it is the duty of passenger carriers, by railway, to carry safely to the place of destination, to announce audibly in each car the station, and then to allow sufficient time for the passengers safely to leave the carriages; and that it is the duty of the passengers to use reasonable care; and to conform to the usages and customs of the company, and of that mode of transportation, as far as known and understood by them.

railway, by the breaking down of a bridge, it is no excuse that the bridge was built by a competent engineer.[8] But it seems to have

Barbour indorses the charge of the Circuit Court, that the carrier of passengers is liable "if the disaster was occasioned by the least negligence, or want of skill or prudence on his part."

But in the case of Boyce *v.* Anderson, 2 Pet. (U. S.) 150, Mr. Ch. Justice *Marshall* lays down the rule of care, in such cases, as that of ordinary care, — the care which all bailees for hire owe the employer. The court, in 13 Pet. 192, attempt to escape from this rule, upon the ground that the remarks of Ch. Justice *Marshall*, in the former case, had reference exclusively to the carriage of slaves, and that the rule laid down would not of necessity apply to ordinary passengers. But it is observable that the learned chief justice makes no such distinction, and also, that the nearer the thing transported comes to the condition of property merely, the higher the degree of care and responsibility, so that the argument seems not only to fail, but to produce a reflex influence.

We refer to this subject here, not with any view to go into the question of the real coincidence of the degree of care of carriers of passengers and that of ordinary bailees for hire, but merely to state that it seems to us the cases really come up to nothing more than that which is required of every bailee for hire, that he should conduct the business as prudent men would be expected to conduct their own business of equal importance. And if the business be of the highest moment, then the care, skill, and diligence should be also of the most extreme character. See also Fletcher *v.* Boston & Maine Railw., 1 Allen, 9; Holley *v.* Boston Gas Light Co., 8 Gray, 131.

If the degree of care and watchfulness is to be in proportion to the importance of the business, and the degree of peril incurred, it is scarcely possible to express the extreme severity of care and diligence which should be required in the conduct of passenger trains upon railways. Hence very few cases of accident and injury have occurred, where it was not considered in some measure attributable to a want of the requisite degree of care. We here refer to the case of Briggs *v.* Taylor, 28 Vt. 180, 184, for a more full exposition of this general subject of the degrees of care and diligence. The rule is here thus stated: —

In regard to the carriage, and the wagons and sleds, which were not past use, although the carriage was an old one, and the wagons and sleds were described by the witnesses as being "not very new nor very old," it seems to us there was no testimony in the case tending to show that an officer who held them under attachment, would be fully justified in letting them stand outdoors all winter. We could scarcely conceive of a state of facts justifying such a course short of absolute necessity, which it would seem, would never occur when boards could be obtained. And where there is no testimony tending to excuse an officer in such case, it becomes a mere question of damages. Questions of negligence are said in the books to be mixed questions of law and fact, but where there is no testimony tending to show negligence, or where a given course of conduct is admitted which results in detriment, and no excuse is given, the liability follows as matter of law, and there is nothing but a question of damages for the jury.

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[8] Grote *v.* Chester & Holyhead Railw., 2 Exch. 251.

been doubted by the court in this case, whether the company could have been chargeable with any fault, if they had adopted the

We do not think a judge is ever bound to submit to a jury questions of fact resulting uniformly and inevitably from the course of nature, as that carriages will be injured more or less by exposure to the weather during the whole winter, or that a judge is bound to submit to a jury the propriety of such a course, when it is perfectly notorious that all prudent men conduct their own affairs differently. This uniformity of the course of nature or the conduct of business becomes a rule of law. But while there is any uncertainty, it remains matter of fact for the consideration of a jury. It could not be claimed that it should be submitted to a jury whether cattle should be fed or allowed to drink, or cows be milked.

As from the determination of the first point a new trial becomes necessary, it will be of some importance to inquire in regard to the proper mode of defining the duty of the officer in keeping goods attached on *mesne* process. It is usually defined in practice in this State, certainly, so far as we know, much as it was in this case, by the use of the terms "ordinary and common care, diligence, and prudence." And it is probable enough these terms might not always mislead a jury. But it seems to us they are somewhat calculated to do so. If the object be to express the medium of care and prudence among men, it is certain these terms do not signify a fixed quality of mediocrity even. For if so, they would not be susceptible of the degrees of comparison, as more ordinary, and most ordinary, which medium, and middle, and mean, are not. The truth is, that "ordinary," and "middling," and "mediocrity," even, when applied to character, do import to the mass of men, certainly, a very subordinate quality or degree; something quite below that which we desire in an agent or servant, and which we have the right to require in a public servant especially. A man who is said to be middling careful, or ordinarily careful, is understood to be careless, and is sure never to be trusted.

We have been at some pains to look into the English books upon this point, and although there may be some exceptions, the general rule certainly is, among the English judges, to express common care and ordinary care by terms less liable to misconstruction, and, as we think, likely to be more justly appreciated by juries. In Duff *v.* Budd, 3 Brod. & Bing. 177, the rule is laid down by *Dallas*, Ch. J., to the jury in these words: "Gross negligence is where the defendant or his servants have not taken the same care of the property as a *prudent man would have taken of his own*," and the judgment is affirmed by the full bench. In Riley *v.* Horne, 5 Bing. 297, *Best*, Ch. J., says of a carrier, "the notice will protect him unless the jury think that *no prudent person*, having the care of an important concern of his own, would have conducted himself with so much inattention, or want of prudence." In Batson *v.* Donovan, 4 Barn. & Ald. 32, the same learned judge lays down the rule thus: "They must take the same care of it that a *prudent man* does of his own property. This is the law with respect to all bailees for hire or reward."

In Wyld *v.* Pickford, 8 M. & W. 443, *Parke*, B., seems to claim a distinction between gross negligence and ordinary neglect, but admits that ordinary neglect may be correctly defined in the above cases. But in Hunter *v.* Debbin,

best mode of constructing the bridge, and the best materials, under the supervision of a competent engineer. This seems to be stating

2 Queen's B. 646, *Denman*, Ch. J., said, in regard to gross negligence, "It might have been reasonably expected that something like a definite meaning should have been given to the expression"; "in none of the numerous cases referred to on the subject is any such attempt made, and it may well be doubted whether between 'gross negligence' and negligence merely, any intelligible distinction exists."

But the English cases all seem to agree in defining ordinary negligence as that which a *prudent man* does not allow in the conduct of his own affairs, and most of the later cases, where the question has arisen, both English and American, repudiate the old attempt to distinguish three distinct degrees of diligence and the correlative degrees of negligence. In Wilson *v.* Brett, 11 M. & W. 113, Baron *Rolfe* makes some very pertinent remarks upon this subject: "I said I could see no difference between negligence and gross negligence, that it was the same thing, with the addition of a vituperative epithet." And in Austin *v.* Manchester Railw., 10 C. B. 454; s. c. 11 Eng. L. & Eq. 513, *Cresswell*, J., refers to the language of Lord *Denman* quoted above, with approbation, and in the steamboat New World *v.* King, 16 How. (U. S.) 469, 474, Mr. Justice *Curtis* seems to adopt a similar view in regard to these distinctions being more or less unintelligible, and in practice often leading to misconstruction and misunderstanding. It seems, too, that these distinctions are repudiated by many of the continental jurists in Europe as producing more uncertainty than they cure; 6 *Toullier's Droit Civile*, 239; 11 id. 203; and although it seems we have adopted these distinctions in the degrees of diligence and negligence from the Roman civil law, I do not find the commentators on that law adopting our loose manner of expressing what is required of a bailee for hire. Domat, part 1, book 1, tit. iv. sec. viii. art. iii., thus expresses the care of such bailees: "He who undertakes to keep cattle, ought to preserve that which is intrusted with all the care that is possible to be taken by persons who are the most watchful and diligent." And this is really synonymous with the rule adopted by the English courts. Mr. Justice *Story* (Bailments, § 11), in order to maintain the old definition of three grades of diligence, defines it much in the manner it was done in the present case: "Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns," which certainly leaves upon the mind a different impression from the definition of Domat and the English judges, but we cannot but regard it as one calculated to mislead juries; and this very writer, in § 13, adopts the diligence of "prudent men" as the measure of common diligence, and it seems to us nothing short of this will do justice in a case like the present.

It may with some plausibility be said, that one who employs a man known to the employer to be habitually indifferent to the management of his own concerns, has no right to expect him all at once, even for reward, to assume a wholly different character; and the jury would be likely so to decide, the question being ordinarily one of fact, when the testimony raises any doubt; and when one employs a man of skill and talent in the management of his own affairs, he may justly expect him to exert the same skill and talent to the same extent in the

a case where the bridge could not have fallen but by an earthquake or some convulsion of nature, for which the company are in

management of the business which he undertakes for others; and in the case of a public officer, who is selected for his fitness for the particular trust, every one may justly expect all the care and diligence which men entirely competent and careful could reasonably be expected to exert in their own business of equal importance.

The absurdity of this measure of duty in a public officer will become sufficiently obvious if we advert to the form of the oath, or of the official bond of public officers. What should we think of having one sworn or giving bond to perform his duty as common men ordinarily do such things. This certainly sounds very different from the official oath, "that you will faithfully execute the office to the best of your judgment and ability," and an official bond obliges officers to the strictest, most faithful, performance of all their duties. Any other standard would sound absurd, and it is obvious to us, that the case of Bridges *v.* Perry, 14 Vt. 262, was not intended to impose any different rule of liability upon officers in keeping property. As said in Drake on Att., § 273: "The officer must comply with all the requisitions of the law" (one of which is to keep safely property attached on *mesne* process, and restore it when required by law), "or show some legal excuse for not doing so." Hence in Sewall *v.* Matton, 9 Mass. 535, an officer was held bound to keep property attached on *mesne* process five years before, ready for sale on the execution, and in Tyler *v.* Ulmer, 12 Mass. 163, it was held an officer could not in such case excuse himself for not producing cattle, by showing that from the scarcity of fodder they could not have been kept alive.

Any injury or loss in such cases renders the officer *prima facie* liable, and imposes upon him the burden of showing some valid excuse. Logan *v.* Matthews, 6 Penn. St. 417; Story on Bail., § 411; Bush *v.* Miller, 13 Barb., 482. There is undoubtedly some contradiction in the cases in regard to the burden of proof of negligence in the ordinary case of bailments for hire, but there can be no doubt, we think, in regard to the question in the present case. This is expressly so laid down in Bridges *v.* Perry. The court in that case, as will be obvious from a careful examination, had no purpose of excusing this class of officers from any degree of care and diligence which careful men would expect under the circumstances.

And this, it seems to us, is the true measure of liability in all cases of bailment. The bailee is bound to that degree of diligence which the manner and the nature of his employment make it reasonable to expect of him; any thing less than this is culpable in him, and renders him liable. The conduct of men in general in the region where the attachment was made, may be some guide to what ought to be required of the defendant in keeping property attached. We mean, of course, prudent and careful men, for no one is expected to go very essentially beyond the common custom of the country in such matters, as it must be attended with extraordinary expense, and a question might thereby arise as to the propriety of incurring such expense.

But see Hood *v.* N. Y. & N. H. Railw. 22 Conn. 1, 15; Galena & Chicago Railw. *v.* Yarwood, 15 Ill. 468; Philadelphia & Reading Railw. *v.* Derby, 14

no sense liable. Where the track of a railway was carried over an embankment of loose sand, likely to be washed away by water, and where the culverts were insufficient to carry off the water, but it not being shown that the embankment had been washed away before, or that the water had ever come up to it, and it being shown, that after the continuance of a very extraordinary storm for a long time, an express train, passing at the usual rate, had been thrown from the rails, and the plaintiff in consequence being injured, it was held, that there was slight or no evidence of negli-

How. (U. S.) 468; Railroad Co. *v.* Aspell, 23 Penn. St. 147, 149; N. J. Railw. Co. *v.* Kennard, 21 Penn. St. 203; McElroy *v.* Nashua & Lowell Railw. Co., 4 Cush. 400; 16 Barb. 356.

In Caldwell *v.* Murphy, 1 Duer, 241, the court say: "The charge of the judge, that the law exacted from a carrier of passengers extraordinary care and diligence, and that they are liable unless the injury arises from force or pure accident, was entirely correct." And in Ingalls *v.* Bills, 9 Met. 1, the same rule is adopted. The injury here occurred from the breaking of the axle-tree of the coach, through a flaw in the iron not visible from the outside, and the defendant had been at great care and expense, in procuring a coach of the best materials and workmanship, as he supposed; and the court say, that carriers of passengers are "bound to use the *utmost care and diligence* in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and if accident happens through defect in the coach, which might have been discovered and remedied upon the most thorough and careful examination of the coach, the owner is liable. But if the injury arise from some invisible defect which no ordinary test will disclose, like that in the present case, the carrier is not liable." Frink *v.* Potter, 17 Ill. 406; Galena & Chicago Railw. *v.* Fay, 16 Ill. 558. See also Wilkie *v.* Bolster, 3 E. D. Smith, 327.

And in a recent English case, Manser *v.* Eastern Counties Railw., 3 Law T. (N. S.) 585, Exch., where the accident occurred from the breaking of the tire of a driving-wheel, where the defect could not be discovered by the original test, but, where it might have been, if it had been repeated when the tire was re-turned, after being considerably worn, the company were held liable.

Slaves are to be regarded as passengers, and carriers only liable for negligence in carrying them. McClenaghan *v.* Brock, 5 Rich. 17.

But a railway company, who take on their trains a slave, and transport him for the usual fare for negroes, such slave having only a general pass, or permit, when the law of the State requires such permit to specify the length of time the slave is to be absent, and the places he is to visit, this being done without the knowledge of the owner of the slave, are liable for a conversion of the slave and for all the injuries received by such slave in consequence of such transportation, whether occurring from the negligence of the company, or not. Macon & Western Railw. *v.* Holt, 8 Georgia, 157. See also upon the general subject of this note, Black *v.* Carrollton Railw., 10 Louisa. Ann. 33.

gence on the part of the company, and a verdict of £1,500 in favor of the plaintiff was set aside as being against evidence.[9] The bed of the roads had in fact become undermined, and the sleepers were unsupported in consequence of the rush of water and the carrying off a bridge above the embankment, it being about midnight at the time the accident occurred, but no evidence to show that the servants in charge of the train were aware of the bad condition of the track, or that the water had come up to the embankment. Water was seen, but not upon the line. The court seemed to think the company not bound to build their track so as to withstand such extraordinary floods. But it certainly deserves consideration whether there is not rashness in driving an express train at the usual rate of speed under such perilous circumstances. We should not expect a jury to hesitate much upon a question of that character.

4. The liabilities of the company attach, although the passenger was riding upon a free ticket as a newspaper reporter.[10] But it

[9] Withers *v.* North Kent Railw., 3 H. & N. 969.

[10] Hodges on Railw., 621; Great Northern Railw. *v.* Harrison, 12 C. B. 576; s. c. 26 Eng. L. & Eq. 443; Gillenwater *v.* Madison & Indianapolis Railw., 5 Ind. 340. And in Nolton *v.* Western Railw., 15 N. Y. 444, it is held that where a railway voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, if such passenger be injured by the culpable negligence or want of skill of the agents of the company, they are liable, in the absence of an express contract exempting them. The point of the degree of care requisite in such cases is here discussed, but not decided. But the argument is in favor of that for which we contend, that the care, diligence, and skill required in any particular business, is determined by the difficulty and peril of the business, rather than by the consideration of the undertaking. This is the same case of a mail agent, who was carried as an accessory of the mail referred to, *post*, § 251, pl. 5. And, although the court seem to regard it as a case of gratuitous transportation, it seems to us it should not so be considered. We should certainly hold it a carrying for compensation by the contract, although nothing in particular was paid for the fare of the agent as such. An agreement upon a free pass, that the person accepting it assumes all risk of personal injury and loss or damage to property whilst using the trains of the company, "does not exempt the company from liability for gross negligence." Indiana Central Railw. *v.* Mundy, 21 Ind. 48. See Ohio & Miss. Railw. *v.* Muhling, 30 Ill. 9, where it is held that the responsibility of a railway company for the safety of its passengers does not depend on the kind of cars in which they are carried, nor on the fact of payment of fare by the passenger. But see Bissell *v.* N. Y. Central Railw., 25 N. Y. 442, where a contract with a cattle-dealer, providing that "persons riding free to take charge of their own stock, do so at their own risk of personal injury for whatever cause," is held binding. In every case where one takes passage

has been sometimes claimed to admit of some question, whether such passenger could always exact the same degree of care and watchfulness as one who paid fare, especially where his ticket, as is not unusual in such cases, contained a notice that passengers who used such ticket rode at their own risk, and the company would not be responsible for the safety of such passengers or their baggage. But the subject is very much discussed in one very important case,[11] in the national tribunal of last resort, where the plaintiff, being president of another railway, was at the time riding by invitation of the president of defendants' road, in a special train for the accommodation of the officers of the road, and without charge. The collision occurred by another engine and tender coming in the opposite direction upon the same track, in disobedience of orders to keep the track clear. *Grier*, J., said: "The confidence induced, by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it. Where carriers undertake to carry persons by the powerful but dangerous agent of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary, or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross." But where one accepts an uses a free ticket, having an express

with a common carrier of passengers, there is, in the absence of special contract, one implied for safe transportation and for fare. Frink *v.* Schroyer, 18 Ill. 416.

[11] Phil. & Read. Railw. *v.* Derby, 14 How. (U. S.) 483. The principle of this case has been followed, in an elaborate opinion of Mr. Justice *Curtis*, Steamboat New World *v.* King, 16 How. (U. S.) 469, 474, where the old theory of different degrees of negligence, defined by the terms, slight, ordinary, and gross, is examined and dissented from. The true theory seems to be, that it makes no difference, whether a service is performed gratuitously or not, in regard to the obligation to perform it well, after it is once entered upon. But it depends chiefly upon the circumstances of the case, and the undertaking of the party. If one is permitted to ride in the company's carriages as a passenger, he is certainly entitled to demand, and to expect the same immunity from peril, whether he pay for his seat or not. The undertaking to carry safely is upon sufficient consideration if once entered upon, as was held in the familiar case of Coggs *v.* Bernard, Holt, 13.

But if the party should obtain consent to ride in some unusual mode, for his own special accommodation, he is then only entitled to expect such security as the mode of conveyance might reasonably be expected to afford.

condition printed thereon whereby the holder "assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss of or injury to property," and the passenger is injured by means of a collision between the passenger train and a freight train left standing upon the track, the company is not responsible.[12] Railway companies may stipulate for exemption from all responsibility for losses accruing to passengers from the negligence of their agents and servants, unless it arise from fraudulent, wilful, or reckless misconduct on the part of some one employed by the company.[12] Where the injury arose from the gross neglect of the agents and servants of the company, it was held not to come fairly within the risk assumed by the passenger.[13]

5. Hiring a train for an excursion does not excuse the company from liability to the passengers for injuries caused by their servants.[14] Or, if the train is under the control of state officers, it will not exonerate the company, or a natural person, if they continue to act as passenger carriers under the State.[15]

6. Since the publication of the second edition, we have had occasion to observe that the profession do not always readily comprehend, or if they do, fail clearly to state, the precise distinction which we have attempted to define between the degree of responsibility assumed by carriers of goods and the carriers of passengers.

7. It seems to be supposed by some, that when it is said that the "utmost" care and diligence is required of carriers of passengers, that if any accident befalls the train upon which they are being transported, which might have been prevented by any degree of human skill or diligence, the carrier is liable for all damages accruing to the passengers. In short, that the carrier assumes all risks of accidental or providential occurrences, provided such contingencies might have been resisted or warded off by any degree

[12] Welles *v.* New York Central Railw., 26 Barb. 641. Gross negligence is here defined to be such as implies fraud or bad faith.

[13] Bissell *v.* N. Y. Central Railw., 29 Barb. 602; Illinois Central Railw. *v.* Read, 37 Ill. 484.

[14] Skinner *v.* L. B. & S. Railw., 5 Exch. 787; s. c. 2 Eng. L. & Eq. 360; Cleveland, Co., & Cin. Railw. *v.* Terry, 6 Ohio (N. S.) 570. But see Peoria Br. Ass. *v.* Loomis, 20 Ill. 235.

[15] Peters *v.* Rylands, 20 Penn. St. 497.

of knowledge or activity within the power of man. The result of such a rule will be to render the carrier responsible for all contingencies not absolutely arising from irresistible force, or what is called the *vis major*, such as tempests and hurricanes and the public enemy. And this, as we have before shown, brings the rule to the same point which defines the responsibility of carriers of goods.[16]

8. The carriers of passengers only contract for their own acts, and for such a degree of watchfulness and diligence as is practicable, short of incurring an expense which would render it altogether impossible to continue the business. Thus it was said, in a recent case,[17] that "the care and diligence to be used by both parties are to be measured by the known perils to which passengers are exposed by the particular kind of conveyance used." And in another case in the same State,[18] it is said: "While courts, in announcing the rule governing common carriers of persons, have said, that they must be held to the utmost degree of care, vigilance, and precaution, it must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted and render it impracticable. Nor does it require the utmost degree of care which the human mind is capable of imagining. Such a rule would require the expenditure of money and the employment of hands, so as to render it *perfectly* safe, and would prevent all persons of ordinary prudence from engaging in that kind of business. But the rule does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted."[19]

[16] *Ante*, § 167. But see *post*, § 192 a.

[17] Chicago, Burlington, & Quincy Railw. *v.* Hazzard, 26 Ill. 373.

[18] Tuller *v.* Talbot, 23 Ill. 357.

[19] This question is further illustrated in Bowen *v.* New York Central Railw., 18 N. Y. 408, where it is said, the rule of responsibility of passenger carriers does not require "such particular precaution as it is apparent, after the accident, might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious person, before the accident, and without knowledge it was about to occur."

Mr. Justice *Johnson* here argues against requiring of passenger carriers every possible precaution against accident of which the mind can conjecture, as defining the precise rule of responsibility of common carriers of goods, as rendering them responsible for all casualties not produced by irresistible force, such as the act of God or the public enemy.

Passenger carriers are not held responsible for the wrongful act of strangers,

9. As railway passenger carriers are bound to use all reasonable precautions against injury to passengers, it will be natural to

or of any party not in privity with such carrier. Thus in Curtis *v.* Rochester & Syracuse Railw., 18 N. Y. 534, the rule is explained more in detail by *Selden*, J.: "Accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them. The straying of cattle or horses upon the road causes numerous accidents which are not chargeable to the company."

It is said, in the last case cited, that where an accident occurs upon a passenger train, it may be fair to presume there was negligence or wrong somewhere; but that such presumption does not attach to the company, unless or until it appear that such accident was attributable to some defect in the road or equipment, or to some want of proper care and watchfulness on the part of the company or its agents. And the same is said in a recent English case, Hammack *v.* White, 11 C. B. (N. S) 587, 594: "Mere proof of an accident having happened to a train does not cast upon the company the burden of showing the real cause of the injury." But it was held, in Dawson *v.* Manchester, Sh. & L. Railw., 5 Law T. (N. S.) 682; s. c. 7 H. & N. 1037, that if a carriage break down, or run off the rail, this will be *prima facie* evidence of negligence. By running off the rail here must be understood spontaneously, it is apprehended, which sometimes occurs from improper construction, or want of care and skill in driving the engine, and may occur from other causes of analogous character. In Pym *v.* Great Northern Railw., 2 F. & F. 619, it occurred from a defective rail. In a recent case in Maine, Edwards *v.* Lord, 49 Me. 279, where an injury occurred to the plaintiff from the upsetting of a stage-coach, it is said common carriers of passengers are bound to use more than ordinary care: they must use such care as very cautious persons exercise, and if an accident occur from any cause which any reasonable skill and care on their part might have prevented, they are responsible.

The question how far, and under what circumstances, the parties to any contract, express or implied, assume the hazard of providential occurrences, is extensively discussed in some late English cases. In Taylor *v.* Caldwell, 32 L. J. Q. B. 164; s. c. 3 B. & S. 826, the plaintiff had contracted with defendant for the privilege of delivering four lectures, on four different days, at the Surrey Gardens and Music Hall; but before the stipulated time arrived the buildings were destroyed by an accidental fire; and it was held that no recovery could be had. But in the very recent case of Appleby *v.* Meyers, Law Rep. 1 C. P. 615; s. c. 12 Jur. (N. S.) 500, C. B., June, 1866, it was decided, that where the plaintiff undertook to erect certain machinery, and to put the same in condition for use, and to keep the whole in order, under fair wear and tear for two years from the date of completion, and the building wherein the erections were to be made was destroyed by fire, without the fault of the defendant, after the erections were partially made, the plaintiff was entitled to compensation for what he had done, as upon a *quantum meruit*.

These cases, and many others in the English books upon analogous subjects,

measure these precautions by those in known use in the same business and the same vicinity or country. So that, if the company fail to adopt the most approved modes of construction and machinery in known use in the business, and injury occur in consequence, they will be responsible, and very justly. As was said in a late English case:[20] The company "was bound to use the best precautions in known practical use to secure the safety of their passengers; but not every possible preventive which the highest scientific skill might have suggested. Hence if companies see fit to adopt an untried machine or mode of construction, the experiment will be at their own risk, and if injury occur to passengers thereby they are responsible.

10. In an important case[21] appealed from the Province of Canada, and heard before the Judicial Committee of the Privy Council,

such as claims for rent where the buildings are consumed by fire during the term, have professed to go upon the basis of the contract, either express or implied, between the parties. It has been said, that where the party contracts absolutely and unqualifiedly for a certain result, he must take the risk of all accidents, it being regarded as his own folly not to stipulate for such contingency. But this rule cannot with any propriety be applied to implied undertakings, which are nothing more than the reasonable implications of the law from a given state of facts. And in making such implications the law will annex all reasonable and just conditions. So that in regard to the undertakings of carriers of goods and passengers, the law has attached certain conditions to the general undertaking, implied from entering upon the transit that the thing or the person is to be carried safely through in a reasonable or the ordinary time, unless prevented, in the case of carriers of goods, by some invincible obstacle, like the act of God, or the public enemy, and in the case of carriers of passengers, that it shall be so done, unless prevented by some agency not under the carrier's control, by the exercise of the strictest care and diligence consistent with the successful conduct of the business.

[20] Ford *v.* London & Southwestern Railw., 2 F. & F. 730, by Chief Justice *Erle*. But in Le Barron *v.* East Boston Ferry Co., 11 Allen, 312, it was held, that a ferry company were not bound to adopt a new and improved method, because safer and better than the one used by them, if not requisite to the reasonable safety and convenience of passengers, and especially where the expense is excessive, that of itself being a sufficient reason to decline to adopt it, if inconsistent with the remunerative results of the business. The comments of *Colt*, J., upon the question of requiring common carriers of passengers to adopt the most approved modes to secure safe transportation, and how far this rule must necessarily be subject to the qualification that its expense was not destructive of the business of the carrier, are worthy of consultation.

[21] Great Western Railw. *v.* Fawcett; Same *v.* Braid, 1 Moore, P. C. C. (N. S.) 101; 9 Jur. (N. S.) 339.

it was held that where an injury accrues from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and the evidence may become conclusive from the absence of any proof on the part of the company to rebut it. A railway company, in the formation of its line, is bound to construct its works in such a manner as to be capable of resisting all extremes of weather, which in the climate through which the line runs might be expected, though rarely, to occur. But where the company had employed skilful engineers, and used all ordinary precautions in the construction, to have the work properly done, and the giving way of the railway was caused by a storm of unusual magnitude, these facts should be brought to the attention of the jury, and their bearing upon the question of negligence fully explained to them; but as the verdict in this case seemed, on the whole, in conformity with the rules of law applicable to the evidence, the judgment thereon was affirmed.

11. Although the happening of damage to a passenger, while carried by common carriers of passengers, is presumptive evidence of negligence on their part, they are not responsible if their neglect did not contribute to the damage.[22] And the passenger-carrier is at liberty to stipulate for exemptions from responsibility except for wilful or gross neglect or recklessness.[23]

12. Where the perils of the way naturally require special watchfulness on the part of the passengers, it is the duty of the carrier to apprise them of the peril, in order to enable them to take the requisite precaution to leave the carriage, and he is liable for any injury which accrues to the passenger in consequence of such omission.[24] And where dangerous operations are going forward upon and above the railway, which may expose the passengers to peril, it is the duty of the company to guard against such perils, although the workmen are not under their control.[25]

13. One who procures a ticket for a passage in the company's cars is to be regarded as a passenger from the time he purchases his ticket; and it is the duty of the company to provide such per-

[22] Tennery *v.* Pippinger, 1 Wallace, Philadelphia, 543. See also Thayer *v.* St. Louis, &c., Railw., 22 Ind. 26.

[23] Boswell *v.* Hudson River Railw., 5 Bosw. 699.

[24] McLean *v.* Burbank, 11 Minn. 277; *Ellsworth*, J., in Derwort *v.* Loomer, 21 Conn. 245, 254; Dudley *v.* Smith, 1 Camp. 167.

[25] Daniel *v.* Metropolitan Railw., Law Rep. 3 C. P. 216.

son a safe passage to his seat in the cars, and to guard against all perils which may befall him in the mean time, as far as that is practicable both by general regulations and special directions, at the time, when it becomes necessary to cross the railway track, in order to take such seat.[26]

14. It is the duty of passenger carriers to exclude from their carriages all lawless and disorderly persons, and where such persons come upon their carriages, in spite of all efforts on their part, to stop the train and rally all force in their power, and exclude the intruders[27] — and probably after failing in that, either to discontinue that trip, or give the passengers an opportunity to leave the carriages, if they choose, before the train proceeds. If this is not done, the carrier will be responsible for the acts of the intruders.

15. A railway company is bound to fence its station so that the public may not be misled by seeing a place unfenced, into passing that way, being the shortest to the station.[28]

16. A case of considerable interest has recently arisen in the Circuit Court of the United States, in the Connecticut District, before *Shipman*, J.[29] The plaintiff was very seriously injured, while a passenger on board one of the defendants' boats, by reason of the discharge of a musket, by being dropped on the deck of the boat by one soldier engaged in a struggle with another soldier, such soldiers, with others, being carried by the defendants, at the same time, with other passengers, who were civilians, the plaintiff being of the latter class. It was held, that passenger carriers, for hire, are bound to exercise the utmost vigilance and care in maintaining order, and guarding those they transport against violence from whatever source arising, which might be reasonably anticipated, or naturally expected to occur, in view of the circumstances, and of the number and character of the persons on board. Under this

[26] Warren *v.* Fitchburg Railw., 8 Allen, 227. In the English and continental railways, no passenger is allowed to cross the tracks, except upon a bridge above, or a tunnel below the line. But it is, nevertheless, constantly done there, to save time; but always at the risk of the passenger. Some such arrangement is requisite certainly for perfect safety, and where none such exists, it is clearly the duty of the company to caution passengers when trains are due.

[27] Pittsburgh, Fort Wayne, & Chicago Railw. *v.* Hinds, 7 Am. Law Reg. (N. S.) 14; s. c. 53 Penn. St. 512.

[28] Burgess *v.* Great Western Railw., 6 C. B. (N. S.) 923.

[29] Flint *v.* Norwich & New York Transp. Co., 34 Conn. 554. SUPPLEMENT.

rule the carrier is bound to protect one passenger from the violence of another. And it was further held, that in the present case, the carrier was not excused by showing that he was compelled by the government to receive the soldiers on board, and that they were in charge of officers; clearly not when he afterwards voluntarily received the plaintiff as a passenger without notice to him of the enforced presence of the soldiers.[30]

SECTION I*a*.

Railway Management and Responsibility.

1. *The distinction between the responsibility of common carriers, and passenger carriers, rather formal than substantial.*
2. *Passenger carriers bound to furnish themselves with every security known to the business, or else the risk caused by any deficiency rests upon them.*
3. *People in foreign countries cannot comprehend our rashness in passenger transportation by railway.*
4. *Comparison of the precautions abroad with those used here. The courts should be more stringent in their demands upon this subject.*
5. *Those who voluntarily submit to destruction, as well as those who perpetrate it, should not go unpunished.*
6. *The instinctive sentiments of juries in holding railway passenger carriers responsible for all injury to passengers, wise and just.*
7. *It is not safe to affirm, that passenger carriers are absolutely bound to safe delivery, at the point of destination. But the rule of law, properly understood and justly applied, falls scarcely short of this.*

§ 192 *a*. 1. There is one subject connected with railway management and responsibility to which we desire to devote some special consideration here, and to guard against being misunderstood. We refer to the exact limits of responsibility, and the precise measure of care and diligence which the law imposes upon, or requires of, passenger carriers by railway. We have been so long accustomed to define this diligence and responsibility by reference to, and comparison with, that of common carriers of goods, and to consider the former as of an inferior degree, as compared with the latter, that it seems to us the profession are not fully sensible of the real extent of the responsibility which the law imposes upon

[30] As a general rule the government can only compel a carrier to transport soldiers and munitions of war when they assume the entire control of his means of transportation, and supply a full freight. Military and civil passenger transportation cannot be properly carried on at the same time and in the same vessels.

railway passenger carriers. The more we have studied and attempted to define this distinction between the degree of responsibility imposed upon railway passenger carriers and common carriers of goods, the more clearly we have felt that the difference is rather formal than substantial. The cases all agree, that passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and that if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible, as well in the case of passengers as of goods. In the latter case it is said that the carrier is absolutely bound to safe delivery, and not in the former. But in the case of goods, the carrier is excused for loss or damage occurring from the misconduct of the owner, either in package, or storage or stowage, or in regard to any other thing when he assumes to act, or direct on his own responsibility. And he is not responsible for damage occurring from inevitable accident or irresistible force, or, as it was formerly said, for those results which follow from the act of God or the king's enemies.

2. And when we admit all these excuses for passenger carriers, there remains very little or nothing more which the law recognizes as an adequate excuse for any damage occurring during the transportation. We are accustomed to suppose that damage occurring from the want of more perfect appliances for passenger transportation, is not chargeable to the carrier; and we are not aware that this precise point has been decided. It is, indeed, not always easy to determine precisely the effect of any particular defect existing in the appliances in actual use upon any particular line of railway where damage occurs, and what might have been the result if the appliances had been as perfect as possible. And so, too, of the management of the particular train, at the time the injury occurred, it is not always a point upon which skilled and experienced men agree, what might have been done more or different from what was done to insure safety. And there are many that suppose the passenger assumes all the risks resulting from such deficiencies as are apparent to all, and therefore presumably known to him. As for instance, when it can be shown with reasonable certainty, that if there had been a double track no damage could have occurred at the time, or in the mode in which it did, the opinion is not uncom-

mon, we believe, that this will not fix the responsibility of the carrier; but we consider this opinion to be altogether erroneous. For if this view can be entertained, and carried to its logical results, it will go a long way towards excusing passenger carriers for all damage which is not the result of some degree of negligence at the very time it occurs.

3. For if railway companies may excuse themselves from responsibility for damage to passengers, by proving the most obvious and criminal defects in the construction and equipment of their roads, or in the use of the commonest precautions to insure safety, there will be no security for railway passengers. We must either eschew railway travelling altogether, or else understand, that in entering a railway carriage, we take our lives in our own hands. It would almost seem that the railway managers in our country have adopted some such theory of absolute immunity from all responsibility, or they would not dare expose their passengers to such awful perils. It is but just to say, that the barbarous and inhuman sacrifice of such multitudes as has occurred, in repeated instances, in our country during the last few years, presents a problem which it is quite impossible for people in other countries to solve, and for which it is not easy for the most friendly disposed to invent any sufficient apology or excuse.

4. And when we reflect how these things are managed in England, by means of actual signals from station to station, showing a clear track before any train is allowed to pass; and especially in some of the continental countries, like Austria and Bavaria, and other German States, and elsewhere, where electric telegraphic stations are maintained at very short intervals, with operators whose sole employment is to know that all is right on the advancing line, and to bow the trains along by the graceful touch of the hat as they pass: When we pass along these lines, with double track throughout, and a perfect road-bed and superstructure and equipment, and all these telegraphic precautions in addition, we cannot but feel surprised that public opinion in America will tolerate such terrible destruction of life, such horrid mangling of bodies and limbs, and literal burning alive, as has occurred here within the last few years. One feels the inexcusable character of these outrages more keenly while surrounded by those who are so incapable of comprehending how it is possible for them to occur. We hope the time is not very remote when our courts will be able

to place themselves upon the proper theory on this subject, that any person, natural or corporate, who undertakes the transportation of passengers by the dangerous element of steam, and with the great speed of railway trains, must be held responsible for the use of every precaution which any known skill or experience has yet been able to devise, and that passengers are not bound to judge for themselves how many of these precautions it is safe to forego.

5. It is no excuse that the public desire cheap and rapid travelling in all directions and everywhere. We do not allow every one, at will, to build railways, and to manage them in his own way; and if the government professes to control these matters at all, it is bound to do it effectually. And if it were made a matter of national supervision, it would be much easier to do so, and thus prevent these daily tragedies, which we have almost ceased to regard in consequence of their frequency. We do not allow monomaniacs or brigands to commit suicide or murder without interference, because it is their pleasure or their interest to do so; and we see no good reason why railway passengers, or railway managers, should be allowed to roast a hecatomb, in human sacrifice, because it seems convenient or desirable to the one or the other class concerned in the immolation, or because the one class demands and the other consents to use a mode of passenger transportation which inevitably produces these results.

6. The truth is, that common juries, with their higher instincts of justice, have always, in our country, been accustomed to view the matter of railway responsibility for passenger transportation, in the light of higher and fuller responsibility than either the courts or the profession. It is not uncommon to hear it objected, in our country, against the reason or justice of jury trials, that the result is always the same in all actions for injuries to passengers on railways; the companies are sure to be cast in the actions, and this seems to be regarded as an unanswerable reproach. But when we reflect how much more might be done, in all such cases, to secure perfect safety and exemption from injury; and how much more really is done, both in Great Britain and on the continent of Europe, we can only conclude, that the common-sense instincts of jurors have raised them to a higher plane of wisdom and justice than that which the courts, or the profession, have yet attained.

7. We do not feel prepared to say that a railway company

which undertakes the transportation of passengers, is absolutely bound to safe delivery, the same as common carriers of goods, inevitable accident, irresistible force, and the misconduct of the party only excepted ; but we must confess, in all sincerity, that the distinction which we have all taken so much labor and pains to maintain, between these two classes of carriers, is rather shadowy and unsubstantial ; and it seems to us that since the introduction of railways we are able to comprehend more fully, that the distinction is really without much just foundation. If no railway company is to be excused for any injury occurring to its passengers, until the company has done all that it was in its power to do to guard against the occurrence of injuries of that character, it will be a long time before we shall hear the repetition of the charge as a reproach, that juries always find against railway companies in such cases. They will be expected to find so. And for one we shall expect that all the excepted cases will soon be reduced to those which exist in the case of common carriers of goods. For if railway passenger carriers are bound to do all for the security of their passengers which human care, skill, and diligence can effect, and if this is to be measured by what is known and done in like cases throughout the world, and the passenger is not presumed to exercise any judgment upon the subject, unless or until he consents in terms, expressly to assume some portion of the risk himself, or constructively does so by violating the regulations of the company, as by needlessly exposing his person, we do not see but the carrier must show, in order to excuse an injury to a passenger, that it resulted from inevitable accident or irresistible force, or was the fault of the passenger. If the carrier is bound to do all that it was possible to have done to prevent the occurrence of injury to his passengers, and really performs his duty, and injury still occurs, it must of necessity be an occurrence in the nature of things inevitable or irresistible.[1]

[1] The foregoing section was prepared, while in Europe, and with reference to what the author there saw and examined with great care and watchfulness. The vast increase in railway travelling here, and the numerous accidents, seemed to us then to justify more stringent requirements of railway passenger carriers than we had before contended for. But it was before the melancholy occurrence upon the Irish Day-mail train, on the London and Northwestern Railway, at Abergele, in Wales, between Holyhead and Chester, in August, 1868. That was an occurrence altogether unparalleled in English railway management, and by the report of Col. Rich, the government official, sent by the Board of Trade to investigate

SECTION II.

Liability where both Parties are in Fault.

1. *Company not liable unless in fault.*
2. *Not liable where plaintiff's fault contributes directly to injury.*
3. *Company liable, for wilful misconduct, or such as plaintiff could not avoid.*
4. *Plaintiff may recover for gross neglect of company, although in fault himself.*
5. *But not where he knew his neglect would expose him to injury.*
6. *May recover although riding in baggage car.*
7. *Company do not owe such duty to wrongdoers.*
8. *May recover although out of his place on the train.*
9. *Plaintiff affected by negligence of those who carry him.*
10. *Fault on one part will not excuse the other, if he can avoid committing the injury.*
11. *Negligence to be determined by the jury, where evidence conflicts.*
12. *Plaintiff must be lawfully in the place where injured.*
13. *Passengers bound to conform to regulations of company, and directions of conductors.*
14. *Precautions to be used by passengers.*
15. *Proof of negligence on plaintiff's part.*
16. *After proof of presumptive negligence, company must show that no reasonable precaution could escape it.*
17. *One crossing a railway track must look out for trains, or he cannot recover.*
18. *Rushing across a track when a train is approaching is foolhardy presumption.*
19. *One cannot recover for an injury the result of heedlessness.*
20. *The degree of precaution required of passenger carriers.*
21. *English courts recognize no difference between negligence and gross negligence.*
22. *Negligence to preclude recovery must directly tend to produce the injury.*
23. *Ordinarily proof must be given of defendants' negligence, and that but for such negligence the injury would not have occurred.*
24. *Passenger carriers must provide suitable accommodations for all passengers.*
25. *Then passengers must conform to the usages and rules of the company or fail to recover.*
26. *Where passenger is injured by the fault of carrier's employees he may recover, but not if done by his own invitation.*

§ 193. 1. To the liability of a railway company, as passenger carriers, two things are requisite, —that the company shall be guilty

the affair, must have occurred from something more culpable than the breaking of a rail, or an axle, on a railway carriage. He boldly denounces it, as the result of the known and habitual disregard of the company's regulations, in regard to running the trains. He says, "I fear that it is really too true that the rules printed and issued by railway companies to their servants, and which are generally very good, are made principally with the object of being produced, when accidents happen from the breach of them, and that the companies systematically allow many of them to be broken daily without taking the slightest notice of the disobedience."

If this be true, as a general thing, in England, it shows that the systematic

of some negligence or omission which, mediately or immediately, produced or enhanced the injury; and that the passenger should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury; since no one can recover for an injury of which his own negligence was in whole, or in part, the proximate cause.[1]

disregard of authority has extended quite as far there as in any other country. We are not quite sure that it will be found entirely practicable to bring mechanics of considerable culture, outside of their special department, to the same nice and unquestioning subserviency to arbitrary rules, which is entirely practicable with men of less highly educated minds. If that be so, it is certainly one result of increased mental culture, greatly to be deplored. It will be found very nearly equivalent to the admission, that the sense of duty, at least so far as obedience to law is concerned, is rather weakened than fortified by mere intellectual culture and refinement. It is not uncommon to hear very wise and discreet men, and reasonably profound thinkers, in a general way, making loud boast of the laborers, and equally of the common soldiers of the present day, and especially in America, having risen above mere mechanical obedience to arbitrary rules, and as having become far more useful on that account. This is certainly not an uncommon course of speculation, on this subject; we could not dignify it with the name of argument; we should as soon think of praising a magistrate for disregarding the nice provisions of a statute; or a judge, for setting at defiance the acknowledged rules of the law in favor of his own preconceived instincts of justice. The truth is, that any man who flatters himself that he is growing wise in proportion as he elevates his own discretion, which is but another name for self-will, above the known rules and laws of his daily duties, has yet much to learn before he can begin to become truly wise in the highest and best sense of loving duty more than self-will.

This awful tragedy at Abergele, whereby more than thirty human lives were lost by an inexcusable and flagrant disregard of the most obvious and clearly understood regulations of the company, must be regarded as specially unfortunate in the place of its occurrence. It will naturally lead to the conclusion, that where there is the more liberty of thought and action, there will be the least respect for law.

It is but a mockery of language to call the perpetrators of such wholesale slaughters murderers! If the wilful slayer of one human being deserves the gallows, what shall be the meet punishment of such wholesale manslayers? We are sorry to feel compelled to admit that railway management, everywhere, in England and America, seems to be growing more and more lawless and insecure. And the most humiliating consideration connected with the subject is, that it is produced more by the self-confidence and wilful independence of the employees, than by any other cause. Heaven commend our lives and limbs to the keeping of men of less intellectual culture and a higher moral sense of duty to obey the law.

[1] Robinson *v.* Cone, 22 Vt. 213; Butterfield *v.* Forrester, 11 East, 60; Simp-

2. But one is only required to exercise such care as prudent persons, under his particular circumstances might reasonably be expected to exercise. Hence a very young child, or perhaps one deprived of some of the senses, or who was laboring under mental alienation, or a very timid or feeble person, would not be precluded from recovering for the negligence of others, when persons of more strength or courage or capacity might have escaped its consequences.[2] And although the plaintiff's

son *v.* Hand, 6 Wharton, 311; Rathbun *v.* Payne, 19 Wend. 399; Barnes *v.* Cole, 21 id. 188; Hartfield *v.* Roper, id. 615.

In this last case the rule was carried to the extreme verge in denying the recovery, and it seems at variance with the more recent cases upon the subject. See Robinson *v.* Cone, 22 Vt. 213; and Lynch *v.* Nurdin, *infra*; also, Birge *v.* Gardiner, 19 Conn. 507; Collins *v.* Albany & Sch. Railw., 12 Barb. 492. In the late case of Martin *v.* The Great Northern Railw., 16 C. B. 179; s. c. 30 Eng. L. & Eq. 473, a query is made whether, if a passenger is hurt in a station of a railway company, after being booked as a passenger, and while going to the train, through the defective lighting of the station, he is precluded from a recovery by reason of his own negligence having contributed to the injury, a distinction being attempted between negligence which is a violation of contract, and that which is only a violation of the general duty to use your own so as not needlessly to injure others. It is no excuse for the carrier's negligence that the negligence of a third party, no way connected with the carrier or the passenger, also contributed to the injury. Eaton *v.* Boston & Lowell Railw., 11 Allen, 500.

We allude to this, not as having marked out any intelligible ground of distinction, but as another indication of a disposition to restrain the universal application of the former rule, that the slightest possible negligence on the part of the plaintiff will, in all cases, prevent a recovery. See Ohio & Miss. Railw. *v.* Gullett, 15 Ind. 487, where, in a suit against a railway company for injuries received while standing on the platform of one of the company's stations, by the falling of wood from a train passing by, alleged to have been carelessly loaded, run, and managed, it is held, that if the injury resulted from any negligence on the part of the plaintiff, he cannot recover.

See also Spencer *v.* Utica & Sch. Railw., 5 Barb. 337; Brand *v.* Troy & Sch. Railw., 8 Barb. 368; Richardson *v.* Wil. & R. Railw., 8 Rich. 120. This was an action in favor of the master for killing his slave while asleep upon the track of the railway. The court held that the negligence of the slave would prevent the recovery. Galena & Chicago Railw. *v.* Fay, 16 Ill. 548. In Fairchild *v.* California Stage Co., 13 Cal. 599, where an injury occurred to a person travelling on a stage-coach, it is held that in case of injury, the presumption is, *prima facie*, that it occurred by the negligence of the coachman.

[2] Robinson *v.* Cone, 22 Vt. 213; Lynch *v.* Nurdin, 1 Ad. & El. (N. S.) 29.

The general proposition that plaintiff's negligence contributing directly to the injury will preclude a recovery, is maintained in a very great number of cases. Vanderplank *v.* Miller, 1 Moo. & M. 169; Luxford *v.* Large, 5 C. & P. 421; Sill *v.* Brown, 9 id. 601; Harlow *v.* Humiston, 6 Cow. 189, 119.

misconduct may have contributed remotely to the injury, if the defendant's misconduct was the immediate cause of it, and

In the case of Sill *v.* Brown, which is regarded as an important and somewhat leading case upon this particular point, the defendant was in fault in carrying the anchor of his brig in a position contrary to the established rules of the navigation, without which the collision complained of would not have occurred. But the plaintiff was also in fault in departing from the known rules of the navigation, and thereby bringing his barge into the position where she was struck by defendant's brig. But if the defendant had not been also in fault, the plaintiff's departure from the rules of the navigation would not have brought the defendant's brig in contact with his barge. And the parties being thus about equally in fault, so that the damage could not have occurred if either had conformed to the rules of the navigation, it was held the plaintiff could not recover. And, by parity of reasoning, if the defendant was guilty of such fault, that the damage was inevitable, he should be held responsible to the extent that he clearly caused the damages, without regard to the defendant's fault. But it is questionable how far the decisions will yet fully justify this rule even. The courts seem to be very dull and slow in bringing the rule of responsibility, where both parties are in fault, to this clear test of principle. It is easier to say, that if the plaintiff is in fault, he cannot recover, than to define the exact extent of the rule as stated above.

But it seems well settled, that the mere fact that both parties were in fault at the time the injury occurred, will not always preclude a recovery. Raisin *v.* Mitchell, 9 C. & P. 613; Smith *v.* Dobson, 3 M. & G. 59.

In Lynch *v.* Nurdin, 1 Q. B. 29, *Denman*, C. J., says, "Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation." Beers *v.* Housatonic Railw., 19 Conn. 566; Neal *v.* Gillett, 23 Conn. 437. In a trial in Connecticut, before Mr. Justice *Seymour*, of the Superior Court, a case of some interest was submitted to a jury. The facts were, that the plaintiff, a child two years old, who sued by guardian, while on the track of the Norwich & Worcester Railway, was run over by a train, and had a leg and hand amputated in consequence. The learned judge left the question of negligence, in both parties, to the jury, saying he did not think negligence could fairly be imputed to so young a child, and that the negligence of the parents, if any, would not hinder plaintiff's recovery, if the defendants, after discovering the plaintiff on the track, might have prevented the injury, which is certainly the more common test of liability in similar cases. The jury gave the plaintiff a verdict for $1,800. But the case will doubtless go before the full bench, and there may be other questions involved. Ranch *v.* Lloyd, *ante*, § 133, pl. 7, 10. The case of Daley *v.* Norwich & Worcester Railw., came before the Supreme Court, 26 Conn. 591, where Mr. Justice *Ellsworth* reviews the cases, and sustains the doctrine of the text to the fullest extent. Pennsylvania Railw. *v.* Kelly, 31 Penn. St. 372. And the fact that the person injured was trespassing at the time, is no excuse, unless he thereby invited the act, or his negligent conduct contributed to it. Daley *v.* Norwich & Worcester Railw., *supra*; Brown *v.* Lynn, 31 Penn. St. 510; Cleveland, Columbus, & Cincinnati Railw. *v.* Terry, 8 Ohio (N. S.) 570.

But in Singleton *v.* Eastern Counties Railw., 7 C. B. (N. S.) 287, it was held,

with the exercise of prudence he might have prevented it, he is not excused.[3]

that where a child, three and a half years old, strayed upon a railway, and had its leg cut off by a passing train, in the absence of all evidence to show that the child came upon the track through the negligence or default of the company, they were not responsible. But the court disclaims all purpose of qualifying the former cases. And in Waite v. Northeastern Railw., El., Bl., & Ellis, 719, where a child too young to take care of itself, and being under the charge of another, who took tickets for both, and while waiting for the train the child was injured by an accident which was caused by the joint negligence of the one who had the child in charge, and the company's servants, it was held, the child could not maintain an action against the company.

This was in the Exchequer Chamber, and the facts were, that where a child five years old, in the care of his grandmother, at a railway station, was injured by a goods train, in crossing the track to the passenger carriages, the jury having found negligence, both in the servants of the company, and in the grandmother, it was held that the plaintiff was so identified with his grandmother, that by reason of her negligence an action in his name could not be maintained against the company. 5 Jur. (N. S.) 936. See also Hughs v. Macfie, 2 H. & C. 744; s. c. 10 Jur. (N. S.) 682, where a similar rule is declared to that in Singleton v. Eastern Counties Railw., *supra*.

In Oldfield v. N. Y. & Harlem Railw., 3 E. D. Smith, 103, it is held, that negligence is not presumed, as matter of law, from a child six or seven years of age being unattended in the streets of a city. Whether permission to the child to go into the streets, in that way, is negligence, is for the jury to determine, from the circumstances of each case. The company will be held responsible for any unsafe arrangement in getting over the track, as for an injury by reason of an unsafe bridge. Longmore v. Great Western Railw. Co., 19 C. B. (N. S.) 183; Nicholson v. L. & Y. Railw. Co., 3 H. & C. 534. So where the train is longer than the platform, and a passenger is injured by jumping to the ground, and the jury award £500 damages. Foy v. London, Brighton, & So. Coast Railw. Co., 18 C. B. (N. S.) 225. So where there was a swing gate at a level crossing, and no one to tend it, one hundred trains passing daily. Bilbee v. Same, id. 584; Stubley v. London & Northwestern Railw. Co., 4 H. & C. 83; s. c. 11 Jur. (N. S.) 954; Stapley v. London, Brighton, & South Coast Railw. Co., Law Rep. 1 Exch. 13; Wyatt v. Great Western Railw. Co., 6 B. & S. 709. The rule in Massachusetts is that the negligence of those who have the charge of children or others, laboring under physical or mental inability to exercise caution on their own behalf, will affect their right of action the same as in other cases. Holly v. Boston Gas Light Co., 8 Gray, 123; Wright v. Malden & Melrose Railw., 4 Allen, 283.

[3] Davies v. Mann, 10 M. & W. 546; Illidge v. Goodwin, 5 C. & P. 190. See also Augusta & Savannah Railw. v. McElmurry, 24 Ga. 75. But where the plaintiff undertook to pass across a freight train standing between the station and the passenger train, and just ready to start, without informing those having charge of the former train, and was so injured that he died, in consequence of the movement of the freight train, it was held the company was not liable. But it was suggested that such an act, in the case of a child or person of less than ordinary discretion, might not have precluded the recovery against the company.

3. So, too, where there is intentional wrong on the part of the defendant, he is liable, notwithstanding negligence on the part of the plaintiff.[4] And if the defendant is guilty of a degree of negligence from which the plaintiff, with the exercise of ordinary care, cannot escape, he may recover, although there was want of prudence on his part.[5]

4. And, in many cases, the plaintiff has been allowed to recover for the gross negligence of the defendant, notwithstanding he was, at the time, a trespasser upon the defendant's rights.[6]

Chicago, &c. Railw. *v.* Dewey, 26 Ill. 255. So, too, the plaintiff cannot recover for the injury resulting from the negligence of the defendant, if notwithstanding such negligence he might have avoided the injury, by the exercise of care and prudence on his part, or if his want of care and prudence, or that of the party injured, in any way contributed directly to the injury. State *v.* Baltimore & Ohio Railway, 24 Md. 84.

[4] Brownell *v.* Flagler, 5 Hill (N. Y), 282. This is the case of a drover knowingly driving off a lamb which had strayed into his drove, and he was held liable, although the plaintiff was first in fault, and defendant, in selling his drove, did not take pay for this lamb.

[5] Bridge *v.* Grand Junction Railw., 3 M. & W. 244. In a late case in Georgia, Macon, & Western Railw. *v.* Davis, 18 Georgia, 679, 686, the rule of law here adverted to is approved by a judge of large experience and reputation. "We approve of modification of the principle, and think that it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendant could not, in the exercise of reasonable diligence, have prevented the collision." So also in Runyon *v.* Central Railw., 1 Dutcher, 556.

But where the plaintiff's conduct is reckless and rash, he cannot recover if such negligence contributed to the injury, and the defendant acted in good faith. Sheffield *v.* Rochester & Syracuse Railw., 21 Barb. 339; Galena & Chicago Railw. *v.* Fay, 16 Illinois, 558. See also Center *v.* Finney, 17 Barb. 94; Moore *v.* Central Railw., 4 Zab. 268, 824; Mackey *v.* New York Central Railw., 27 Barb. 528.

And in Macon & W. Railw. *v.* Wynn, 19 Ga. 440, it is held, that if, notwithstanding the negligence of defendant, the plaintiff in the exercise of common care and prudence might have avoided the injury, he cannot recover. And the general proposition, held in the same company *v.* Davis, *supra*, is reaffirmed in the Central Railw. & Banking Co. *v.* Davis, 19 Ga. 437.

[6] Birge *v.* Gardiner, 19 Conn. 507; Bird *v.* Holbrook, 4 Bing. 628. This is the case of spring-guns set in the defendant's grounds without plaintiff's suspecting it. See also Ilott *v.* Wilkes, 3 B. & Ald. 304, where the plaintiff had reason to suspect the danger, and might by the exercise of prudence have escaped it, and he failed to recover. Cotterill *v.* Starkey, 8 C. & P. 691. There are numerous cases where a party has been held responsible for allowing real property to remain and be used in a condition unsafe for others, who might rightfully or even wrongfully pass it. As where one employed a coal-dealer to put coal upon his premises, and in so doing he opened a trap-door, and by means

5. But in all cases where both parties are in fault, and the plaintiff's fault was upon a point which he knew, or had reason to believe, would or might contribute to the injury, he cannot recover; and the rule laid down by Lord *Ellenborough*, Ch. J., in Butterfield *v.* Forrester, applies to the great majority of cases involving this inquiry: "One person being in fault will not dispense with another using ordinary care for himself. Two things must concur to support this action: an obstruction in the road, by the default of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

6. One being in the baggage car, with the knowledge of the conductor, will not preclude him from a recovery for an injury caused by a collision, even though he might or would not have been injured if he had remained in the passenger car.[7] And where a passenger upon a stage-coach was injured by the overturning of the carriage, after he had been requested by the driver to ride inside the carriage, and had refused, and was told that if he kept the outside he must do it at his own risk, it was held that this

of its not being properly guarded, a person having occasion to pass there was injured by falling into it. Pickard *v.* Smith, 10 C. B. (N. S.) 470. But where one has a mere license to pass premises, and the owner has machinery there and a shaft sunk in connection therewith, the contractor is not responsible for insufficient fencing, whereby such person is injured. Bolch *v.* Smith, 7 H. & N. 736. Nor is a canal company bound to fence or light the banks of the canal. Bincks *v.* S. Y. & R. D. Nav. Co., 3 B. & S. 244; s. c. 7 L. T. (N. S.) 350. Nor is a railway company liable for having stairs in improper condition for safe use, unless, where one fell down the stairs, it is shown the accident occurred from the defect. Davis *v.* London & Br. Railw., 2 F. & F. 588; see also Wilkinson *v.* Fairrie, 1 H. & C. 633; s. c. 9 Jur. (N. S.) 280; Hadley *v.* Taylor, Law Rep. 1 C. P. 53; s. c. 11 Jur. (N. S.) 979; Gray *v.* Pullen, 11 L. T. (N. S.) 569; Welton *v.* Dunk, 4 F. & F. 298; Lee *v.* Riley, 18 C. B. (N. S.) 722.

[7] Carroll *v.* N. Y. & N. H. Railw., 1 Duer, 571. The Court here say: "He was under no obligation to be more careful and prudent than he was, in contemplation of there possibly being such highly culpable conduct on their part." But where, by the general regulations of the company, its engineers were prohibited from allowing any one not in its employ to ride upon the engine, and the plaintiff was permitted to ride upon the engine by the engineer without paying fare, after he had been informed of the company's regulations upon the subject, and sustained an injury while so riding, it was held that he was a wrong-doer and could not recover, the consent of the engineer conferring no legal right. It was also said, that the *onus* of showing the authority of the engineer was upon the plaintiff, the presumption being that the plaintiff had no right to ride upon the engine, whether he paid fare or not. Robertson *v.* New York and Erie Railw., 22 Barb. 91.

would not exonerate the carrier, it appearing that the accident occurred from the negligence of the driver, and that the position of the plaintiff in no way contributed to it.[8] And we apprehend that the plaintiff's negligence, in order to excuse the defendant from responsibility, must always be such as contributed directly to the injury.[9]

7. And where the locomotive of a railway ran across the legs of a person while walking upon their track in the streets of a city, it was held that the party could not recover if his own negligence contributed to the injury; and that a railway is not bound to the same degree of care in regard to mere strangers who may voluntarily, but unlawfully, go upon their track, which they owe to passengers conveyed by them.[10]

8. It was held that a passenger, who, having livestock upon the train of freight cars, was, by the regulations of the company, required to remain upon the cars that contained his stock, was not precluded from recovering for an injury by collision with another train by reason of his being, at the time, in another part of the train.[11]

9. And it seems that the negligence of those who carry the plaintiff, contributing to the injury, will preclude his recovery as much as if it were his own act.[12] But the negligence must be of a character directly and naturally to contribute to the injury, it would seem, in either case.[12]

[8] Keith *v.* Pinkham, 43 Maine, 501.

[9] Colegrove *v.* N. Y. & Harlem & N. Y. & N. H. Railw., 6 Duer, 382.

[10] Brand *v.* Troy and Sch. Railw., 8 Barb. 368. The latter proposition stated in the text in reference to this case, seems to us highly reasonable and just. See Philadelphia & Reading Railw. *v.* Hummell, 44 Penn. St. 375.

[11] The Penn. Railw. *v.* McCloskey, 23 Penn. St. 532. In this case it is said a passenger is not in fault in obeying the specific instructions of the conductor, although in conflict with the general regulations of the company, known to him.

[12] Thorogood *v.* Bryan, 8 C. B. 115; Catlin *v.* Hills, id. 123. In this case it was held, where a collision occurs through the fault of two companies, running on the same track, and the suit is against them jointly, it is a misjoinder, but may be waived by pleading to the merits. Held, also, that each company, in such case, is liable for the injury to plaintiff, although both are in fault, and that plaintiff may recover, notwithstanding he was standing on the platform of the car, there being no notice posted up in the car prohibiting such practice, as required by the statute, and no right in the other company to run on the track that day, and no reasonable ground to apprehend they would attempt to do so.

In this case the charge to the jury, that the plaintiff's negligence, in order to

10. One party being in fault will not excuse the other party, if, by the exercise of ordinary care, he might still have avoided the injury, notwithstanding the fault of the first party.[13] This point is illustrated by a recent case,[14] where a boy, ten years old, wrongfully came upon a street railway car, while it was in motion, without the means or the intention of paying fare.

11. And what is proper care will be often a question of law, where there is no controversy about the facts.[15] But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.[16]

defeat the action, must have contributed to the "accident which caused the injury," was held well enough, and in popular language equivalent to saying that it "must have contributed to the injury complained of." But it seems to us these terms are not altogether equivalent. The misconduct of plaintiff might not have the slightest agency in the production of the "accident which caused the injury," and still might have been the procuring cause of the injury itself. The word accident is susceptible of such an application as to stand for the injury itself. But the charge in this case excluded that view; and in popular language the "accident is the cause of the injury." See Chicago, Burlington, & Quincy Railw. *v.* Coleman, 18 Ill. 297.

Where the vehicle of a passenger-carrier is injured by a collision resulting from the mutual negligence of those in charge of it and of another party, the carrier must answer for the injury. But if the negligence of the carrier did not directly contribute to the injury, though there may have been negligence in a general sense, the other party will be answerable if the act of his servant or agents was the proximate cause of the disaster. Lockhart *v.* Lichtenthaler, 46 Penn. St. 151.

A query is here made as to whether the defence of concurrent negligence in the agencies producing death, if a defence at all, can be heard without being specially pleaded. But the contrary is held in Colegrove *v.* N. Y. & Harlem, & N. Y. & N. H. Railways, 6 Duer, 382, and in Chapman *v.* N. H. Railw., 19 N. Y. 341.

[13] Trow *v.* Vermont Central Railw., 24 Vt. 487; 13 Ga. 86.

[14] Lovett *v.* Salem & So. Danvers Railw. Co., 9 Allen, 557; Owens *v.* Hudson River Railw., 2 Bosworth, 374.

[15] Trow *v.* Vt. Central Railw., 24 Vt. 487; Henning *v.* N. Y. & Erie Railw., 13 Barb. 9; Gahagan *v.* Boston & Lowell Railw., 1 Allen, 187.

[16] Quimby *v.* Vermont Central Railw., 23 Vt. 387; Briggs *v.* Taylor, 28 Vt. 180; Patterson *v.* Wallace, 1 McQu. Ho. Lds. 748; s. c. 28 Eng. L. & Eq. 48. Here the judgment of the court below was reversed, although there was no controversy about the facts, but only as to whether a certain result was to be attributed to negligence on one side, or rashness upon the other, the judge having withdrawn the case from the jury, in the court below, it was held, in the House of Lords, to be a pure question of fact for the jury. See Taff Vale Railw. *v.* Giles, 2 El. & Bl. 822; s. c. 22 Eng. L. & Eq. 202; N. Y. & Erie Railw. *v.* Skinner, 21

12. It has been held that a passenger in a railway car is not bound, in order to entitle himself to an indemnity against the negligence of the company, to select his seat so as to incur the least hazard.[17] All that is requisite in such case is that the plaintiff should, at the time, have been where it was lawful for him to be.[17]

13. If one should contrary to the general regulations of the company notified to him generally, and especially by particular notice from the conductor at the time, expose himself to peril, as by letting his hand remain out of the car window while passing a bridge, it would be evidence of gross carelessness upon his part, which would, on that ground alone, justify a verdict against his claim for damages.[18]

Penn. St. 298. In Murray *v.* Railw. Company, 10 Rich. (S. C.) 227, it was held, that it was the duty of a railway company to slacken speed at a turnout, and to give warning when approaching a crossing; and it must not appear that such duties were disregarded, when the company attempt to show themselves not guilty of negligence. See Chicago, Burlington, & Quincy Railw. *v.* Hazzard, 26 Ill. 373, where it is held, that it is not negligence in an engineer of a train, on arriving at a station, if he should let on more than the exact quantity of steam necessary to overcome the friction of frogs and switches, thereby creating a jerking motion of the train, provided in so doing he exercises a reasonable discretion.

It is not usual to place a chain across the back end of the platform of a caboose car, and the omission to do so is not negligence. A passenger taking a freight train takes it with the increased risk or diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, it is all that those who embark on it have a right to demand. Ib.

And where one attempted without any necessity, to pass between cars in motion, propelled by an engine, it was held to be such unequivocal evidence of negligence, that the court were justified in charging the jury, as matter of law, that the party could not recover. Gahagan *v.* Boston and Lowell Railw., *supra*. And where a person of mature years knew that a freight train was standing ready to move between him and the passenger train, and that his passing in the night-time through the freight train might not be seen by those managing it, and they were not notified of his design to pass, it was held that should he attempt to pass, and be injured, it would amount to such negligence on his part as to defeat a recovery. It would be otherwise had a child or person of less than ordinary discretion so conducted. Chicago, Burlington, & Quincy Railw. *v.* Dewey, 26 Ill. 255. See also Chicago, Burlington, & Quincy Railw. *v.* Hazzard, *supra*.

[17] Carroll *v.* N. Y. & N. H. Railw., 1 Duer, 571, 572.

[18] Laing *v.* Colder, 8 Penn. St. 479. But see N. J. R. *v.* Kennard, 21 Penn. St. 203, where it was held, that if a railway company run passenger cars upon a road where the way is so narrow as to endanger the arms of the passengers, while resting in the windows of the cars, they are bound to provide wire gauze, bars, slats, or other barricades, to prevent the passengers putting their arms out of

14. But one is not precluded from recovery for an injury caused by the negligence of the company, because he was standing upon the platform of the cars. And the statute of the State of New York providing that where a passenger is so injured the company shall not be liable, provided there was at the time sufficient room in the inside of the cars for the accommodation of such passenger, has reference to such casualties as prove injurious only to persons upon the platforms of the cars. And a railway company, in order to claim the exemption created by the statute, must show not only that there was room within the cars sufficient to contain the passenger, but that there were seats unoccupied. And passengers are not obliged to urge other passengers to give up half a seat, or even whole seats, needlessly occupied by them.[34]

15. The burden of proof in regard to negligence in the company, and due care on his own part, is upon the plaintiff who alleges an injury by one of the company's engines.[19] But as negligence on the part of the plaintiff is not to be presumed, he is not bound to introduce positive evidence of the negative; but where there is conflicting evidence upon the point, the burden of proof is upon him.[20]

the windows, or they are liable for all injuries happening in consequence of such omission. But to deprive the party of his right to recover, it must appear that his violation of the rules of the company, or the orders of the company's servants, contributed to the injury. And where the conductor of a gravel train, who was prohibited by the company letting persons ride, as passengers, and who informed defendant in error of the prohibition, nevertheless consented to take him as a passenger, and received fare from him, it was held he might recover of the company for an injury, through the negligence of their servants, during his passage. Lawrenceburgh & Upper Miss. Railw. *v.* Montgomery, 7 Porter (Ind.), 474. See also Zemp *v.* W. & M. Railw., 9 Rich. 84, where the plaintiff was injured while standing on the platform of the cars, the passengers remaining in the cars uninjured, and it appearing that notices were posted up in the cars prohibiting passengers from standing on the platforms, it was held to be a question for the jury whether the plaintiff had notice of the prohibition, and also whether the fact of his disregarding it contributed to the injury, and they having failed to find these facts, and given the plaintiff ten thousand dollars damages, the judgment was affirmed in the Court of Appeals. Ib.

[19] Robinson *v.* Fitchburg & Worcester Railw., 7 Gray, 92.

[20] Button *v.* Hudson River Railw., 18 N. Y. 248. But it has sometimes been claimed the plaintiff must give affirmative evidence of his own exercise of due care and caution at the time the injury occurred. But this, in principle, is much like one giving evidence of the good character of his witnesses, before any im-

16. After the presumption of negligence has been established against a carrier of passengers, it can only be rebutted by showing that the accident was the result of circumstances against which human prudence could not have guarded. By this we are to understand such prudence as one might have taken before the occurrence, and not that which afterwards it may be apparent would have been proper.[21]

17. One who attempts to cross a railway track about the time a train of cars is due, and with his head so bundled as to obscure his hearing, and without looking to see if the cars are approaching, is guilty of such negligence that he cannot recover for an injury thereby sustained; and it will make no difference that the engineer gave no warning of the approach of the train, as the statute requires. Such omission on the part of the company does not affect their liability otherwise than the omission of any common-law duty, unless some specific consequence is expressly provided in the statute as the result of such omission.[22]

18. One who, after the proper signals are given by a passing train, and while the flagman is upon the crossing waving his flag, is killed in attempting to rush his team across the track of a railway in a highway, is guilty of such reckless and foolhardy misconduct, that no recovery can be had for the injury.[23]

19. And where one, while waiting for a train, in the daytime, caught his foot against a weighing machine, the edge of which was raised a few inches above the platform where it was necessary to be used in weighing baggage, and thereby fell and broke his kneepan, it was held there was no evidence to go to the jury.[24]

20. In a recent English case,[25] the question of the degree of caution required of passenger carriers is carefully considered. It is here said, that, in determining whether evidence of negligence has been given before the jury, the court must use the ordinary experience of life, and must consider whether the evidence of negligence be reasonable. And in commenting upon the case, which

peachment, and is never required, we think. See also Barber *v.* Essex, 27 Vt. 62; Hill *v.* New Haven, 37 Vt. 501.

[21] Bowen *v.* N. Y. Central Railw., 18 N. Y. 408.

[22] Steves *v.* Oswego & Syracuse Railw., 18 N. Y. 422.

[23] Wild's Adm'x *v.* Hudson River Railw. Co., 24 N. Y. 430.

[24] Corman *v.* Eastern Counties Railw., 4 H. & N. 781.

[25] Crafter *v.* Metropolitan Railw. Co., Law Rep. 1 C. P. 300; s. c. 12 Jur. (N. S.) 272.

was where the plaintiff fell, upon a staircase, in going from the platform into the street, in consequence, as he alleged, of the stairs being rendered slippery by reason of brass nosing upon the edge of the steps, and having no hand-rail upon the top of the banisters, the learned judges declare, that passengers are not entitled to have every precaution to insure safety which it is possible to suggest, after an accident has occurred, might have prevented it.[25] If any actual damage accrues to the passengers from the construction of a passage which they will naturally take, the company are responsible,[26] as where there was an aperture in the railing of a bridge.[26] But if a stairway is protected by walls on each side, the railway company is not bound to maintain a hand-rail upon the top of it for passengers to steady themselves by; or to put lead upon the edge of the steps instead of brass, because it is less slippery. The opinion of witnesses is not competent evidence of the necessity of such precautions.[25]

21. The English courts seem finally to have come to the definite conclusion that there is no difference between negligence and gross negligence, the latter being nothing more than the former with a vituperative epithet.[27] And in the same case it was decided, that where the bill of lading specially excepted "perils of the sea," this will not embrace those perils which become disastrous by reason of the negligence or want of skill of the carrier and his servants. And the same rule was laid down in a former action against the same company.[28]

22. The question, what degree of negligence will preclude the party from recovery of another who is guilty of negligence directly producing the injury, is extensively and judiciously discussed in Isbell *v.* New York & N. H. Railway Company,[29] and the conclusion reached, that it must be a direct and actual, and not merely a constructive wrong, and one that is the proximate cause of the injury, and not merely the remote and incidental cause of it.[29]

[26] Longmore *v.* Great Western Railw., 19 C. B. (N. S.) 183; Rigg *v.* M., Sheffield & L. Railw., 12 Jur., (N. S.) 524.

[27] Grill *v.* Iron Screw Collier Co., Law Rep. 1 C. P. 600; s. c., 12 Jur. (N. S.) 727.

[28] Lloyd *v.* The General Iron Screw Co., 3 H. & C. 284; s. c., 10 Jur. (N. S.) 661.

[29] 27 Conn. 393. It is said in a late English case, Cotten *v.* Wood, 8 C. B. (N. S.) 568, 7 Jur. (N. S.) 168, that it is equally the duty of one crossing a street or road to look out for vehicles coming along, as it is for the drivers of

23. The rule of law deducible from the cases is fully and correctly stated, we believe, in a late case decided in the Exchequer in Ireland.[30] The plaintiff cannot recover unless the injury was caused by the negligence of the defendant; nor even then, if he has so far contributed to the accident, by want of ordinary care, that but for that the accident would not have happened; but strictly, even in that case, the plaintiff is not precluded from a recovery if the defendant might, by ordinary care, have avoided the consequences of the plaintiff's neglect. So also the mere happening of an accident is not sufficient evidence of negligence, ordinarily, to be left to the jury, but the plaintiff should give some affirmative evidence of negligence on the part of the defendant.[31] But in many cases the very happening of the accident shows want of due care, as where the defendants let fall a barrel of flour upon the plaintiff as he was passing the street.[32] And where an engine-driver blew off steam at a road crossing, on grade, where there was considerable passing, in such a manner as needlessly to frighten horses waiting to pass the line, it was held sufficient to warrant the inference that there was, in the company, actionable negligence.[33]

these vehicles to be vigilant in not running against persons crossing; and one suing for such an injury must give affirmative and preponderating evidence of neglect of duty on the part of the driver. And it is here declared to be established, that where the evidence on each side, in cases of this kind, is equally strong against the other's negligence having caused the accident, the judge ought not to leave it to the jury as proving negligence either way. But perhaps, where the evidence is conflicting, the judge is not the proper functionary to determine whether it is equally strong both ways. We should say he must submit it to the jury with instructions not to find a verdict upon an equal balance of evidence.

[30] Scott *v.* Dublin & Wicklow R. Co., 11 Ir. Com. Law, 377.

[31] Hammack *v.* White, 11 C. B. (N. S.) 588; s. c. 8 Jur. (N. S.) 796.

[32] Byrne *v.* Boadle, 2 H. & C. 722. See also Cox *v.* Brubridge, 13 C. B. (N. S.) 430; s. c. 9 Jur. (N. S.) 970; Scott *v.* London Docks Co., 3 H. & C. 596; s. c. 10 Jur. (N. S.) 108; s. c. 11 Jur. (N. S.) 204. It was here declared by the Exchequer Chamber, that where the thing which causes the accident is known to be under the management of the defendant or his servants, and the accident is such as would not happen in the ordinary course of management, the accident itself if unexplained, is reasonable evidence of negligence. And this seems to be the true ground upon which to rest the question. Where there are two modes of doing work in a public highway from which damage may result to a passer-by, both of which are usual, but one more dangerous than the other, it is for the jury to determine whether it is negligence to adopt the mode whereby others are most exposed. Cleveland *v.* Spier, 16 C. B. (N. S.) 399.

[33] Manchester & S. J. Railw. Co. *v.* Fullarton, 24 C. B. (N. S.) 54.

It seems scarcely necessary to multiply cases to show, that passenger carriers must first see that those they carry are properly provided with every reasonable accommodation, and this being done, that passengers, who desire to secure their own safety, or failing of that to hold the carrier responsible for consequences, must keep in their places.

24. Thus in the State of New York, where, by statute, passengers injured while standing upon the platforms of the cars while in motion, and in violation of express notices posted within their view, are precluded from maintaining an action, provided there was at the time sufficient room within the cars, it was held, that a passenger who selected the safest place he could find upon the platform, and was injured while standing there, was not within the provisions of the statute, unless the company provided him a seat within the cars, and that for that purpose he was not obliged to displace the person, or property, of another passenger, that being the duty of the conductor; and that it was no sufficient compliance with the statute, that there might have been sufficient room in a car, remote from the place where the plaintiff was allowed to enter.[34]

25. So, also, where the plaintiff's arm, being outside the window, was injured by the swinging of the unfastened door of another car, it was held he could not recover, it being his duty to keep his entire person within the limits of the car he sat in. And in such case, it was held competent for the court to direct a verdict for the defendants, there being no controversy in regard to the plaintiff having voluntarily placed his arm beyond the point where the sash of the window would fall.[35] So, also, where a railway passenger train is stopped, at night, to allow a train in the opposite direction to pass, and no notice is given that the passengers may leave the cars, but the plaintiff left the cars and walked into an open cattle guard, and was injured, it was held he could not maintain any

[34] Willis *v.* Long Island Railw., 34 N. Y. 670.

[35] Todd *v.* Old Colony Railw., 7 Allen, 207. But the court cannot decide as matter of law, that standing or riding on the outside platform of a street car is such carelessness as to preclude the party from recovery for an injury sustained by being thrown therefrom. Meesell *v.* Lynn & Boston Railw., 8 Allen, 234. So also it is a question of fact, whether passengers may properly pass from one car to another, while in motion, in order to find a seat, at the suggestion of the defendants' servants. McIntyre *v.* N. Y. Central Railw., 37 N. Y. 287. See also Wayne *v.* Pennsylvania Railw., 53 Penn. St. 460.

action therefor; and it will make no difference, that the plaintiff had been misinformed, by some one not in the employ of the company, that he must go and see to having his baggage passed at the custom-house, which the train was supposed to have reached; or that the train was near a passenger station, which was not his destination.[36]

26. In some English cases, actions have been brought for injuries to passengers by having their hands shut into the doors of the railway carriages. Such questions will not be likely to occur, unless where the same style of carriages are in use. In one case where the plaintiff placed his hand upon the carriage door to raise himself into the carriage, and the porter immediately closed the door, without giving any warning, shutting in and injuring plaintiff's hand, the court declined to disturb a verdict in his favor.[37] But in another case, where the plaintiff suffered his hand to remain upon one of the doors after being seated in the cars, knowing the porters would immediately close them, and where timely notice was given before closing them, it was held the plaintiff could not recover.[38]

SECTION III.

Injuries by Leaping from the Carriages.

1. *Passengers may recover, if they have reasonable cause to leap from the carriage, and sustain injury.*
2. *But not where their own misconduct exposes them to peril.*
3. *But may recover, if injured in attempting to escape danger.*
4. *Cannot excuse leaping from cars because train passes station.*
5. *Must resort to their action for redress.*
6. *Rule of law, where train passes station.*
7. *Rules where a person enters the cars to see another seated.*
8. *Company bound to stop their train a sufficient time.*
9. *No recovery can be had where passenger leaves the cars on the wrong side.*
10. *Recent decision in England.*
11. *Dissenting opinion approved.*
12. *The case affirmed in the Exchequer Chamber.*
13. *Is still open to grave doubts.*

§ 194. 1. It seems to be regarded as well settled, that a passenger who is induced to leap from the carriage, whether by coach or railway, by a well-founded apprehension of peril to life or limb, induced by any occurrences which might have been guarded

[36] Frost *v.* Grand Trunk Railw., 10 Allen, 387.

[37] Fordham *v.* Brighton Railw., Law Rep. 3 C. P. 368.

[38] Richardson *v.* Metropolitan Railw., Law Rep. 3 C. P. 374 & n.

against by the utmost care of the carriers, is entitled to recover for any injury which he may thereby sustain,[1] where no injury would have occurred if he had remained quiet,[2] or where the conduct of the passenger contributed to produce or enhance the injury.[3]

2. In one case, where the passenger was taken upon the train after the passenger cars were filled, and was told that he must ride in the baggage car, and he consented to do so, but soon began boisterous play with others, and obtruded into the passenger cars, and, when they were thrown from the track, leaped upon the ground and was injured,[4] the court said: "The contract was for a passage in the baggage car. The carrier would have no right to overload and crowd passengers already in the other cars. When passengers take their seats they are entitled to occupy as against the carrier and subsequent passengers. While this right is recognized and protected to them, they are required to conduct themselves with propriety, not violating any reasonable regulation of the train." The court also held that the passengers have no right to pass from car to car, unless for some reasonable purpose; and, as the proof showed that the plaintiff below had no such excuse, and, had he remained in the car where he belonged, would not have been injured (that car not having been thrown from the track), or, probably, have felt any impulse to jump from that car, it was his own fault and folly which exposed him to the peril, and the company were not liable for its consequences, and the action could not be maintained.

3. But, where one incurs peril by attempting to escape danger, the author of the first motive is liable for all the necessary or natural consequences.[5]

[1] Ingalls *v.* Bills, 9 Met. 1; Eldridge *v.* Long Island Railw., 1 Sandf. 89; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181; Frink *v.* Potter, 17 Ill. 406; Southwestern Railw. *v.* Paulk, 24 Ga. 356.

[2] Jones *v.* Boyce, 1 Stark. 493; Ingalls *v.* Bills, 9 Met. 1.

[3] Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181.

[4] Galena & Chicago Railw. *v.* Yarwood, 15 Ill. 468.

[5] Railw. Co. *v.* Aspell, 23 Penn. St. 147, 150. The court here say: "If, therefore, a person should leap from the cars under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself." McKinney *v.* Neil, 1 McLean, 540, 550.

4. But where the passenger leaped from the cars because the train was passing the station at which he wished to stop, and after the conductor had announced the station, notwithstanding the conductor and brakeman assured him the train should be stopped and backed to the station, it was held, that the injury he received was the result of his own foolhardiness, and he could not throw it upon the company. The court below had charged the jury, that announcing the station by the conductor, while the cars were in motion, was itself an act of negligence, and the plaintiff had a verdict. But the judgment was reversed in the Court of Errors, which, in giving judgment, said, —

5. "If a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of travelling back, because these are direct consequences of the wrong done him. But, if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, and for this, his own gross imprudence, he can blame nobody but himself."

6. In regard to the conductor announcing the station, the court said, "We consider the charge of the court below entirely wrong. It is not carelessness in a conductor to notify passengers of their approach to the station at which they mean to get off, so that they may prepare to leave with as little delay as possible when the train stops. And we cannot see why such a notice should put any man of common discretion in peril. It is scarcely possible that the plaintiff could have understood the mere announcement of the station as an order to leap from the cars without waiting for a halt." And where the train passes its usual stopping-place, and a passenger leaps from the carriage while in motion to avoid being carried beyond his destination, and sustains an injury, he cannot recover.[6]

[6] Damont v. New Orleans & Carrollton Railw., 9 Louis. Ann. 441. But where the court charged the jury that it was clearly the duty of common carriers of passengers by railway, not only to call out the stations for which they have passengers, but to see that passengers and their baggage are put off at the proper stations, it was held too stringent a rule. Southern Railway v. Kendrick, 40 Miss. 374. But we apprehend such is the general practice of railway conductors, where only one or two or very few passengers leave at stations, and where there are more to notify them to leave at the next station, at the time of receiving their tickets. If railway conductors were held responsible, as they should be, to

7. And where a person enters the cars for the purpose of seeing another safely seated, and is injured in leaving them, he cannot recover if he was guilty of negligence which contributed to his injury. And where he attempted to leave the cars after they were in motion, and persisted in attempting to get out, it was held sufficient to preclude his recovery for an injury thereby sustained, notwithstanding the conductor gave him no special notice of the time of the departure of the cars, and was guilty of negligence in starting the cars, and in a jerk occurring soon after, both of which contributed to produce the injury.[7]

8. The company are bound to stop their trains, at all stations where they profess to leave passengers, a sufficient time to enable them to alight. And if they do not, and one is injured in consequence while attempting to leave the cars, the company are liable.[8]

9. But if the company had prepared a platform for the accommodation of passengers leaving the cars, and a passenger leaves the cars on the opposite side and is killed in consequence, the company are not responsible, not having been in fault. And even if both parties had been in fault, there could have been no recovery.[9]

10. It has recently been decided by the Court of Exchequer, *Kelly*, C. B., dissenting, that where the train, on arrival at the station overshot the platform, by which it was requisite, in order to get out of the car, to make a descent of about three feet, and the plaintiffs (husband and wife), after waiting a short time and seeing no movement to run the cars back, or in any way enable them to remove from the car in any other way, made the descent, the husband first, and then the wife, standing on the iron step of the carriage and taking both the hands of her husband, jumped down, and in so doing sprained her knee, and the jury having found for the plaintiffs for £300, that a new trial must be granted, on the ground that there was no evidence for the jury of negligence on the part of the defendants.[10]

give clear information to all passengers, when and where to leave the cars, the passengers themselves would feel less anxiety, and fatal accidents in consequence would not be likely to occur as they sometimes do.

[7] Lucas *v.* Taunton & New Bedford Railw., 6 Gray, 64.

[8] Pennsylvania Railw. *v.* Kilgore, 32 Penn. St. 292.

[9] Pennsylvania Railw. *v.* Zebe, 33 Penn. St. 318.

[10] Liner *v.* Great Western Railw., Law Rep. 3 Exch. 150.

11. Ch. B. *Kelly* maintained, that the stopping of the train at the station, without any notice to the passengers not to get out, was an invitation to them to do so; the descent at that place was dangerous, but not so clearly so that the plaintiffs might not properly encounter the risk; and the company, having wrongfully put the passengers to the necessity of choosing between two alternatives, the inconvenience of being carried on and the danger of getting out, they were liable for the consequence of the choice, provided it were not exercised wantonly or unreasonably. And this seems to us exceedingly just and reasonable, and strictly in accordance with the doctrine of the case of Foy *v.* London, Brighton, & South Coast Railway,[11] the facts of which were very similar. We should be surprised if the views of the learned Chief Baron do not ultimately prevail in the appellate courts.

12. But since the foregoing was written, the report of the decision[12] in the Exchequer Chamber has come to hand, and the judgment has been affirmed, with only the dissenting opinion of Mr. Justice *Keating*. The decision here seems to rest mainly upon the rashness, or imprudence, of the party injured, in jumping from the cars, without requesting that they might be pushed back against the platform, or seeking some other mode of alighting, before jumping. It seems to us rather a lame case, and sufficiently apologetic toward railway companies, who leave passengers to get out of their carriages in the best way they can. If the company are to be excused, when their carriages fall short, or when they overreach the platform at the station, and no effort is made to enable the passengers to alight from them in safety, and passengers are to take the consequences of any accidents occurring from their leaping out, when there is no other means of escape afforded, it comes, practically, very near saying, the company are not responsible for any deficiencies in their accommodations, whenever it is possible to conjecture any mode in which passengers might have escaped injury. We should be surprised to have any such rule of responsibility, on the part of passenger carriers, long prevail anywhere.

13. The true rule in such cases would seem to be, that where any arrangement, connected with passenger transportation, was admitted, by being afforded, to be a necessary convenience for the security or comfort of the passengers, it should be the duty of

[11] 18 C. B. (N. S.) 225. [12] 17 W. R. 417.

carriers to afford it to all, as far as practicable, and if any injury occurred in consequence of their failure to do so, they should be held responsible, unless the party was in fault. This would ordinarily involve so many inquiries of fact, as to require the case to be submitted to the jury. And the omission to do that seems to be the great ground of doubt in regard to the decision of the case now under consideration. We do not suppose much doubt will arise, upon this point, in the American courts; and we cannot but feel that the strictest and fairest construction of the rules of law requires a question of this character to be submitted to the jury, and therefore, that the dissenting opinions in this case rest upon sounder views than those of the majority. And it was upon this ground, that we ventured to express a hope that the decision would not be maintained by the appellate courts. The case will probably reach the House of Lords, since the decision in the Exchequer Chamber fails to have the support of either of the Lord Chief Justices, and was dissented from in the first instance by the Lord Chief Baron of the Exchequer, and cannot, therefore, be regarded as of the fullest weight notwithstanding its authority.

SECTION IV.

Injuries Producing Death.

1. *Redress, in such cases, given exclusively by statute.*
2. *Form and extent of the remedy under the English statute.*
3. *Where the party is in fault, no recovery can be had.*
4. *By English courts no damages allowed for mental suffering.*
5. *In Pennsylvania, damages measured by probable accumulations.*
6. *In Massachusetts, company subjected to fine not exceeding* $5,000.
7. *Wife cannot maintain the action for death of husband, or father, for death of child.*
8. *In Illinois, the personal representative sues for the benefit of the widow and next of kin. Rule of damages.*
9. *Form of the indictment.*
10. *If those having charge of passengers, not* sui juris, *leave them exposed, company not liable.*
11. *No action lies if death caused by, neglect of fellow-servant or by machinery.*
12. *Servant liable for consequences of using defective machinery.*
13. *Compensation to the party bars claim of representatives.*
14. *Parents may recover for death of child of full age.*

§ 195. 1. Within the last few years, and chiefly it is presumed on account of the increased peril to life by railway travelling, it

has been provided by statute, in England and in most of the American States, that redress shall be given against the party causing a personal injury, from which death ensues. These acts, although intended chiefly to stimulate watchfulness and circumspection in passenger carriers, especially carriers by railways and steamboats, are, as was suitable, made general, and in some of the states the recovery is in the form of a penalty.

2. The English statute, usually denominated Lord Campbell's Act,[1] provides that when death shall be caused by wrongful act, neglect or default, such as would (if death had not ensued) have entitled the party to an action, in every such case an action may be maintained by the executor or administrator of the party injured, and the jury may give such damages as shall be proportioned to the injury resulting from the death of the party, to his family, to be divided among the parties named in the act, as the jury shall direct. Only one action can be brought, and that is to be commenced within twelve months of the decease of the party injured.

3. It is considered, that if the party's own negligence contributed to the injury, the action will not lie, any more than if the party had survived and brought the action himself.[2]

4. It has been held that, under the English statute, no damages are recoverable for the mental sufferings of the survivors, who are, by the act, entitled to share the amount recovered, but that the damages must be limited to the injuries of which a pecuniary estimate can be made.[3]

[1] 9 & 10 Victoria, ch. 93.

[2] Lord *Denman*, Ch. J., in Tucker *v.* Chaplin, 2 Car. & K. 730. A railway company is liable for injuries, resulting from the negligence, violence, or carelessness of its conductors in removing from the car a passenger who refused to pay his fare, in consequence of which he died. Penn. Railw. Co. *v.* Vandiver, 42 Penn. St. 365.

So if the negligence of those who carry the plaintiff contributed to the injury, it is the same thing. Thorogood *v.* Bryan, 8 C. B. 115. Where the deceased was warned of his danger, it is presumptive, but not conclusive, evidence of negligence. North Pennsylvania Railw. *v.* Robinson, 44 Penn. St. 175.

[3] Blake, Adm'r, *v.* Midland Railw., 18 Q. B. 93; s. c. 10 Eng. L. & Eq. 437.

Coleridge, J., said: "The important question is, whether the jury, in giving damages apportioned to the injury resulting from the death of the deceased to the parties for whose benefit this action is brought, are confined to injuries of which a pecuniary estimate may be made, or may add a *solatium* to those parties,

5. In the American courts, the decisions in the different States will differ, as the statutes are different. The rule laid down in

in respect of the mental suffering occasioned by such death. . . . Our only safe course is to look at the language the legislature has employed. . . . The title of the act is, for compensating families of persons, &c., not for solacing their wounded feelings."

It was argued that the party, had he recovered, would have been entitled to such *solatium*.

"But it will be evident this act does not transfer this right of action to his representative, but gives to his representative a totally new right of action, on different principles." By the terms of the act, quoting the second section, "the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family."—"This language seems more appropriate to a loss of which some estimate may be made, than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings, and the division of the amount strongly tends to the same conclusion. It seems to us that if the legislature had intended to go the extreme length, not only of giving compensation for pecuniary loss, but a *solatium* to all the relations enumerated in the act, language more clear and appropriate for this purpose would have been employed." And because the judge did not limit the damages to the pecuniary loss sustained by the death, a new trial was awarded. Hodges on Railways, 624.

There seems no doubt, according to the best-considered cases in this country, the mental anguish, which is the natural result of the injury, may be taken into account, in estimating damages to the party injured, in such cases, although not of itself the foundation of an action. Canning *v.* Williamstown, 1 Cush. 451; Morse *v.* Auburn & Syracuse Railw., 10 Barb. 623.

But it has been held, that in an action under the English statute to recover damages for the death of a person, the damages are not to be estimated according to the value of deceased's life, calculated by annuity tables, but the jury should give what they considered a reasonable compensation. Armsworth *v.* Southeastern Railw., 11 Jur. 759.

In the last case cited, *Parke*, Baron, instructed the jury, that they were "to determine, according to the ordinary rules of law, whether, if the deceased had been wounded by the accident, and were still living, he could recover compensation in the way of damages against the company for the wound given, under the circumstances in evidence in the case," and estimate damages "on the same principle as if only a wound had been inflicted."

Another case is very strikingly illustrated, as applicable to the general subject, and the difficulties of laying down any rule in regard to damages in such cases, in an article in the "London Jurist," vol. xviii., part 2, p. 1, for the following extract from which, we refer to the editor's note to Carey *v.* Berkshire Railw., 1 Am. Railw. Cas. 447.

The writer in the "Jurist" says, "On the 15th of December, 1852, the case of Groves *v.* The London & Brighton Railw. Co., was tried at Guildhall, in the Court of Common Pleas, before *Jervis*, Ch. J. That was an action brought by the executor of the deceased, for the benefit of four infant children. That the

Pennsylvania[4] is, that the jury are to estimate damages "by the probable accumulations of a man of such age, habits, health, and

deceased had met with his death through the negligence of the defendants' servants was admitted, the only question being the amount of damages. In summing up, the learned chief justice referred to the case of Blake *v.* London & Brighton Railw. Co., and told the jury that in assessing the damages they might take into consideration any injury resulting to the children from the loss of the care, protection, and assistance of their father. The jury gave £2,000. Now, if the argument *ab inconvenienti* was permitted to prevail against the allowance of compensation for the mental anguish of the relatives, it ought not, we submit, to be without weight in considering the soundness of this direction. Juries have no small difficulties to contend with in assessing damages, when they have before them evidence of the average profits, or the amount of the life income of the deceased; but these are but trifling to those in which they must become entangled in attempting a *pecuniary* estimate of the loss of the care, protection, and assistance of a father. In whatever light we look at the subject, either of money or morals, we become perplexed in the attempt to pursue it. It is conceived that in such cases evidence may be given of the character of the deceased, and in many cases this would doubtless be of a most painful nature.

"Moreover, serious practical difficulties would arise. Let us suppose, that, through the negligence of a pointsman, — in the belief of his employers a trustworthy servant, — an accident happens to a train containing the six following fathers: An archbishop, a lord chancellor, an East Indian director, a lunatic, a wealthy but immoral man, and one virtuous but a bankrupt. It is needless to dilate on the difficulties which juries would experience if called upon to estimate the pecuniary value of the parental care, protection, and assistance of each of these."

In a late English case serious doubts are suggested whether an action will lie, under the English statute, to recover damages in the name of the administrator, for the death of an infant (so young as to be unable to earn any thing), by way of compensation for the loss of the services of the child to the family. Bramhall *v.* Lee, 29 Law Times, 111. In Dalton *v.* Southeastern Railw. Co., it was held, that the father might have an action, under Lord Campbell's Act, 9 & 10 Vict. ch. 93, for an injury resulting in the death of a son, twenty-seven years old and unmarried, who had been accustomed to make occasional presents to his parents, on account of the reasonable expectation of pecuniary profit from the continuance of his life, and of that expectation being disappointed. But it was held not competent for the jury to give, by way of damages, compensation for the ex-

[4] Penn. Railw. Co. *v.* McClosky, 23 Penn. St. 526, 528. The court say: "The jury must place a money value upon the life of a fellow-being, very much as they would upon his health or reputation." In the trial of such an action, it is proper for the judge, in charging the jury, to allude to the expectation of life at certain ages, as determined by tables, deduced from the bills of mortality. Smith *v.* N. Y. & Harlem Railw., 6 Duer, 225; City of Chicago *v.* Major, 18 Ill. 349.

pursuits, as the deceased, during what would probably have been his lifetime."

6. By the statute of Massachusetts,[5] passenger carriers, causing the death of any passenger through their own negligence or carelessness, or that of their servants or agents, within the Commonwealth, are subjected to a fine, not exceeding five thousand dollars, to be recovered by indictment to the use of the executor or administrator of the deceased person, "for the benefit of his widow and heirs."

7. It was held that the wife cannot sustain an action for the death of her husband, under this act.[6] Nor can the father sustain

penses incurred by him for his son's funeral, or for family mourning. 4 C. B. (N. S.) 296. Nor can damages be awarded as a *solatium*, or in respect of the loss of a legal right, but on the ground of a reasonable expectation of pecuniary advantage from the continuance of the life. It is not necessary that actual benefit should have been derived; but reasonable expectation of sensible and practical pecuniary benefit is sufficient. Franklin *v.* same Co., 3 H. & N. 211; s. c. 31 Law Times, 154. But in the case of Oldfield *v.* New York & Harlem Railw., 3 E. D. Smith, 103, it is said that the New York statute, giving a right of action in this class of cases to the next of kin, does not limit the amount to be recovered to the loss of those only whose relations to the deceased gave them a legal right to some pecuniary benefit, which would result from the continuance of the life. An action will lie in every such case, under the statute, where the deceased, had he survived, could have maintained one. The damages are not restricted to the actual pecuniary loss, but include present and prospective damages, in the discretion of the jury. Accordingly, in the present action, brought for the benefit of the mother of an infant daughter, seven years of age, killed in the streets of New York by one of defendants' cars being drawn over her, it was held that a verdict for $1,300 did not justify the court in granting a new trial, the amount, although "large, not affording evidence of prejudice, partiality, or corruption." This case is affirmed in the Court of Appeals, 4 Kernan, 310, upon the ground that the question of negligence was properly submitted to the jury, and that no proof of special or pecuniary damage was necessary, in order to maintain the action. In a case in California, Fairchild *v.* California Stage Co., 13 Cal. 599, it is held that damages for pain of mind ("mental anguish") are recoverable.

[5] March 23, 1840. Proceedings under this act are not within the statute of limitations for actions, and suits for penalties. Commonwealth *v.* Boston & Worcester Railw., 11 Cush. 512. It has been held that in proceedings under this statute it must be alleged, that administration has been taken within the Commonwealth. Commonwealth *v.* Sanford, 12 Gray, 174.

[6] Carey *v.* Berkshire Railw., 1 Cush. 475. And under the New York statute, giving an action to recover the pecuniary injury to the wife and next of kin, if there be no wife or next of kin, no action will lie. The husband cannot recover damages for the death of the wife. Lucas *v.* N. Y. Central Railw., 21 Barb. 245; Worley *v.* Cincinnati, Hamilton, & Dayton Railw., 1 Handy, 481.

such action for the loss of service of his child, by death.[7] Nor in either of the last two cases will an action lie at common law.[6 and 7]

8. By the statute of Illinois the right of action in such cases is given to the personal representative, and the damages recovered are for the exclusive benefit of the widow and next of kin, and the jury are to give damages for the pecuniary injury to such parties. It was held not necessary to the recovery, that the widow and next of kin should have had any legal claim upon the deceased for their support, if he had survived.[8] It was here said by Mr. Justice *Nelson*, that the damages must depend very much upon the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case. Where the action is by the husband as administrator of his wife, where the damages are for the next of kin, the services of the wife and mother, in the nurture and instruction of her children, had she survived, may properly be brought to the consideration of the jury by the judge in his charge,[9] and the consideration is not necessarily to be restricted to the minority of the children.

9. In an indictment under this statute, it is not necessary to specify the names of the servants or agents guilty of the negligence, or the nature or manner of such negligence.[10]

[7] Skinner *v.* Housatonic Railw., 1 Cush. 475.

[8] Railroad Co. *v.* Barron, 5 Wallace, 90. And by the New York statute it is not requisite to the recovery that there should be "a widow and next of kin" surviving the deceased party. McMahon *v.* New York, 33 N. Y. 642. The New York statute does not apply to a cause of action in tort accruing in a foreign state, and no action will lie thereon in New York, when the death of the party ensues. Crowley *v.* Panama Railw., 30 Barb. 99. In Balt. & Ohio Railw. *v.* State, 24 Md. 271, the rule is thus stated. In an action for negligently causing the death of plaintiff's husband, an instruction that "in the absence of proof (other than the death, age, and condition of the deceased, and of the members of the family of the deceased, of actual damages, the jury could find only nominal damages:" was held rightly refused. The jury were instructed to confine themselves to such damages as would afford to the family of the deceased the same support they would have obtained from his labor during the time he would probably have lived and earned a livelihood, but that they might consider the age, health, and occupation of the deceased, and the comfort and support afforded to the family of the deceased at the time of his decease." Held correct.

[9] Tilley *v.* Hudson River Railw., 29 N. Y. 252.

[10] Commonwealth *v.* Boston & Worcester Railw., 11 Cush. 512. In an action upon the statute of Massachusetts, 1842, c. 89, § 1, which provides that "the action of trespass on the case for damage to the person shall hereafter survive, so

10. The want of care in the deceased, which contributed to produce the injury, we have seen, will preclude the recovery of damages, under the statutes, allowing actions to be maintained in those cases where the party does not survive the injury. So, also, in the case of persons incapable of taking care of themselves, if those who have the custody of them improperly expose them, and injury ensues, causing death, the company are not liable, although guilty of negligence. Where a lunatic was travelling in the cars, upon a railway, in charge of his father, who had paid the fare of himself and son through, and taken tickets, but who got out at a station to procure refreshments, leaving the son in the cars, without giving notice to any one of his situation, the train left the station before he returned. The conductor applied to the lunatic for his ticket, not knowing his condition, or that his fare had been paid. The lunatic not surrendering his ticket, the conductor stopped the train and had him put out, where he was killed by another train. It was held, that no action could be maintained against the company, under the statute, the fault being upon the part of those who were responsible for the deceased, and not on that of the company, or its agents.[11]

that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended, by or against his executors or administrators, in the same manner as if he were living," it was held that the right of action depended on the question, whether the testator, or intestate, lived after the act which constitutes the cause of action. *Shaw*, Ch. J., said: "If the death was instantaneous, and of course simultaneous with the injury, no right of action accrues to the person killed; and of course none to which the statute can apply. But if the party survives, lives after it, the right of action accrues to him as a person *in esse*, and his subsequent death does not defeat it, but by operation of the statute, vests it in the personal representative." Hollenbeck, Adm'r, *v.* Berkshire Railw., 9 Cush. 481. See also Mann *v.* Boston & Worcester Railw., id. 108. Where the party was by the injury rendered immediately insensible and died in fifteen minutes thereafter, the cause of action was held to survive to the personal representative. Bancroft *v.* Boston & Worcester Railw., 11 Allen, 34.

[11] Willetts *v.* N. Y. & Erie Railw., 14 Barb. 585. See also Hibbard *v.* N. Y. & Erie Railw., 15 N. Y., 455. But the admissions of a deceased husband against the interests of the wife, in an action for personal injury to her, brought, after the death of the husband, in her own name, such admissions being made after the alleged injury occurred, and while the husband, had a suit been instituted, must have been joined, are nevertheless inadmissible, on the ground that the husband is not the real but only a nominal or formal party. Shaw *v.* Boston & Worcester Railw., 8 Gray, 45; *ante*, § 192.

11. Nor does an action lie, under these statutes, where the death is caused by the negligence of a fellow-servant, unless such servant was habitually careless and unskilful; or if produced in the use of defective machinery, which the deceased knew to be unsafe.[12] Nor where the death is caused by defective machinery, or through defect of fences, if the servant knew of the defect, and made no remonstrance.[13]

12. And it has even been considered in such case, that the servant, being an engineer, would be liable to any person injured by such defect.[13]

13. Where the deceased in his lifetime received a sum of money in satisfaction of the injury, his subsequent death in consequence of the injury, creates no new cause of action.[14]

14. Where the deceased was over twenty-one years old, but having made arrangements to become a substitute for a drafted man had declared his intention of giving his bounty to his parents, and was killed on his way to be mustered into the service, it was held that these facts were proper evidence to show the continuance of the family relation, and to found an action by his parents.[15]

[12] Hubgh *v.* New Orleans & Carrollton Railw., 6 Louis. Ann. 495. See *ante*, § 131, n. 2, 12, 15; Timmons *v.* Central Ohio Railw., 6 Ohio (N. S.) 105.

But if the servant object to the use of machinery, as unsafe, and it is still used, whereby he loses his life, damages may be recovered under the statute. Marshall *v.* Stewart, 2 McQu. Ho. Lds. 30; s. c. 33 Eng. L. & Eq. 1.

[13] McMillan *v.* Saratoga & Wash. Railw., 20 Barb. 449. It is here said, the servant may require special indemnity against all risks, or he may give notice to the company, and throw the risk upon them. See Slattery's Adm'r *v.* T. & W. Railw., 23 Ind. 81, where it is held, that

A brakeman on a train, and one whose duty and business it is to attend a switch, are engaged in the same general undertaking, and the company are not liable to one for an injury caused by the negligence of the other.

The complaint stated in substance that A. was brakeman on a freight-train of defendants, and was killed by the cars being thrown off the track by the breaking of a switch-pin, which the company and their servants, knowing it was insecure, had carelessly left out of repair for twelve days previous. There was no switch-tender, and the whole care of the switch, and every thing pertaining to its security, were under the control of the section-agent and his hands, who had nothing to do with running the trains.

Held, that in the absence of an averment that the company were negligent in employing an incompetent section-agent, the complaint did not sufficiently state a case of negligence against the company.

[14] Read *v.* Great Eastern Railw., Law Rep. 3 Q. B. 555.

[15] Pennsylvania Railway *v.* Adams, 55 Penn. St. 499.

SECTION V.

Suits where the Injured Party is a Married Woman.

1. *In a suit by husband for injury to the wife he may recover the expenses of the cure.*
2. *But such expenses cannot be recovered in a suit on behalf of the wife for her personal injuries.*

§ 196. 1. For injuries to a married woman through the negligence of railways, as passenger-carriers, the husband may recover for expenses of the cure, and the loss of service,[1] and in one case it was held to extend to funeral expenses, as well as medical attendance, where the wife did not recover; but if death be instantaneous, no action lies at common law.[2]

2. But in a suit in the name of husband and wife, where the wife survives, a recovery cannot be had for the expenses of cure.[3] In such action recovery can only be had for the personal injury and sufferings of the wife. The action in such case, for the loss of service, and of the society of the wife, and for the expenses of the cure, must be brought in the name of the husband alone,[4] unless where they have been charged upon the separate estate of the wife.[5]

[1] Pack *v.* Mayor of New York, 3 Comst. 489. And see Ford *v.* Monroe, 20 Wendell, 210, where it is held the father may recover for killing his child, and for medical attendance upon his wife, the mother, caused by the death of the child.

[2] Eden *v.* Lexington & Frankfort Railw., 14 B. Monr. 204.

[3] Fuller & Wife *v.* Naugatuck Railw., 21 Conn. 571.

[4] Cases cited above, 1, 2, 3.

[5] Moody *v.* Osgood, 50 Barb. 628.

SECTION VI.

Liability, where Trains do not Arrive in Time.

1. *Company liable to deliver passenger according to contract.*
2. *May excuse themselves by special notice.*
3. *Liable for damages caused by discontinuance of train.*
4. *Carriers not performing according to previous notice liable to all injured, as for breach of duty.*
5. *Not liable for injury caused by stage company, connecting with railway.*
6. *Company excused, by giving proper notice of the course of their trains and the places of changing cars.*
7. *Rule of evidence and of estimating damages in such cases.*
8. *In order to recover special damages in such case it must appear clearly that they occurred and were inevitable.*

§ 197. 1. It would seem, upon general principles, that railways should be liable for not delivering passengers within the stipulated time, as much as for not delivering goods according to their undertaking, unless they can show that such contract is subject to some exception which existed in the particular case. And in the county courts in England, it is said such actions have repeatedly been maintained.[1]

2. But if the company give proper notice, that they will not be responsible for the arrival of their trains in time, it would seem they are not liable.

3. But where they advertise to run trains in a given mode, they are liable for any injury, which one who took an excursion ticket sustained, by not finding a return train on the day it was advertised, he having returned by express, and sued the company for the expense.[2]

[1] Hodges on Railways, 619. It was held in the U. S. Circuit Court, September, 1856, before *Nelson*, J., that where one sold tickets to carry passengers from Panama to San Francisco, and stipulated that the ship should leave on her trip in the month of April, 1850, he must run all hazards of wind and weather, and could not excuse himself on account of any accidental or providential occurrence of that kind, having made no such exception in his contract. 19 Law Rep. 379.

[2] Hawcroft *v.* Great Northern Railw., 16 Jur. 196; s. c. 8 Eng. L. & Eq. 362. See also Denton *v.* Great Northern Railw., 5 El. & Bl. 860; s. c. 34 Eng. L. & Eq. 154, where it is held that a railway company, continuing to advertise on their time-tables that a train will leave a station at 7.20, and arrive at another point beyond their line at 12, after this connecting train is discontinued, and by consequence their own train of that hour, whereby one suffers pecuniary loss, in

4. And it has been said, that the liability of a passenger carrier for not stopping at a certain place and taking passengers, accord-

not being able to proceed by such train, and thereby being delayed in his arrival in season for his business, is liable to an action for such injury.

But in the case of Hamlin v. Great Northern Railw., 1 H. & N. 408; s. c. 38 Eng. L. & Eq. 335, the plaintiff took passage in a train which was advertised to go through the same night to the point of his destination, by connecting with the trains of another company, and it proved, on arriving at the point of connection, that the other train had left. The plaintiff was compelled to stay over night, and proceeded the next morning, having to purchase a new ticket for the remainder of the route, and did not arrive till one o'clock the next day. When he took defendants' train, he paid for and took a ticket through, and, by the time-tables advertised in defendants' office, he should have arrived at his destination 9.30 P. M., having taken the train at 2 P. M.

The plaintiff might have accomplished his journey that night, by taking a special conveyance and hiring a boat to cross the Humber, but he slept at a hotel, and proceeded the next morning by the public conveyance, but arrived too late to meet his customers according to appointment, and was obliged to hire conveyances to see some of them elsewhere, and was detained several days, waiting for the market days, to see others. It was held that he was only entitled to recover his hotel expenses, and the railway fare the next day, and was not entitled to recover for any damage whatever in consequence of not reaching his destination, according to defendants' undertaking. This case seems to have taken rather an extreme view of the rule of damages on this subject. The very least the defendants could have expected to pay for the breach of duty should have been, it would seem, the expense of a special conveyance through that night. The rule here adopted seems to be almost equivalent to a denial of all beneficial redress in such cases. For it is scarcely to be supposed that actions would ever be brought to recover such insignificant damages. It is quite supposable that one might suffer very serious loss in consequence of such a failure to arrive in time, and if an action is maintainable, it should not be made a terror by attaching to it a rule of damages which will render it as expensive to the plaintiff as to the defendants, who are solely in fault. It seems also at variance with some former decisions in the English courts. See cases above in this note. We conjecture that this rule will not be ultimately followed in the courts of Westminster Hall. *Martin*, Baron, who tried the case at *Nisi Prius*, seems to have placed it upon the ground, that the defendants, having no knowledge of plaintiff's business, or its necessities, could not fairly be supposed to have undertaken to indemnify him against this loss. But the learned judge conceives the defendants may stand upon the terms of their contract. But he seems altogether to overlook the fact, that it was not the fault of the passenger that the company did not understand the necessities of his business. He would no doubt have readily disclosed such facts upon proper inquiry. And are the company to be benefited by their own reserve upon this point? The true rule would seem to be that the passenger is entitled to such damages as naturally resulted from the facts known to himself, and upon the basis of which he purchased his ticket. And if the plaintiff, instead of remaining over night, had gone forward the same night, as he might have done, and as by

ing to public announcements made known through the public prints, or in writing, is one founded upon a tortious violation of a general duty, and not upon any breach of special contract. And the courts, from the general facts alleged in the declaration, will put such a construction upon the plaintiff's claim as is consistent with the facts and the legal duty resulting from established legal principles.[3] Common carriers of passengers who write to the postmaster to give notice of the arrival of their boat upon a certain day thereafter named, and who do not stop at the place upon the day appointed, are guilty of a breach of public duty, and any one suffering loss thereby may have an action. And if such letter is equivocal, it is competent to show by evidence *aliunde*, as by the circumstances under which the letter was written, and the business in which the company were employed, that it had reference to coming to the place named on the day appointed, for passengers.[4]

the contract he was entitled to do, the defendants would have been liable for the additional expenses. This may perhaps be the more just and practicable rule, in cases where the party had ample time to proceed by express in season for his appointments. But if, instead of doing so, he delays for the next train, and thereby suffers damage beyond what would have been necessary to defray the expense of going forward according to the contract, we see no reason why the company should not, at all events, bear that portion of the loss which was necessarily incurred in consequence of their breach of contract.

No question is made in the case in regard to the special damage not being specifically declared for. If that question had been made, there might have been some ground for saying that it did not come within the general averments found in the declaration, which is the only ground upon which it seems to us the case can be made to stand with the earlier English cases upon the subject. Hutchinson *v.* Granger, 13 Vt. 386; *ante*, § 131, n. 15. In the later case of Randal *v.* Roper, 9 El. & Bl. 84; s. c. 31 Law Times, 81, the defendant sold the plaintiff a spurious article, warranted as "chevalier seed barley"; the plaintiff resold to others with similar warranty; the seed was sour and very inferior crops grown. The sub-purchasers made claims upon the plaintiff for breach of warranty, but brought no actions, nor had the plaintiff paid any thing at the time of trial. It was held the plaintiff could recover such sum as the jury thought reasonable to indemnify him against the claims of sub-purchasers. This seems a more reasonable rule of damages than some of the preceding. But where the sale on warranty and consequent responsibility for damages are not in the contemplation of the parties at the time of the first sale, no such damage could be recovered. Portman *v.* Middleton, 4 C. B. (N. S.) 322.

[3] Heirn *v.* McCaughan, 32 Miss. 17; New Orleans, &c. Railw. *v.* Hurts, 36 id. 660.

[4] Heirn *v.* McCaughan, *supra*.

5. But the company, advertising that stages will run from their stations to other places off the line of the railway, and selling tickets at their stations for such places, that is, to carry upon the railway to the nearest stations and then by stage, will not render the company liable for any injury to such passenger upon the stage, after he leaves the railway, the company having no ownership, or interest in the stages. This does not constitute a special contract to carry, as far as the ticket reaches.[5] But the facts are certainly very analogous to many cases, where a special contract has been held to exist, in regard to carrying goods beyond the line of the carrier to whom first delivered.[6]

6. Where the company give such published notice of the running of their trains, and such special notice in the cars of the necessity of changing cars at any particular station, that any traveller of ordinary intelligence, by the use of proper care, would be in no danger of mistaking his route, it will not be liable where passengers mistake the place of changing cars, and by remaining in the same car are carried out of their intended route.[7]

7. In an action against passenger carriers, for not furnishing suitable accommodations; for delay and detention in the route; and for expense of injury and sickness caused thereby in an unhealthy climate; it was held unobjectionable for the judge to admit evidence of how much the plaintiff was exposed to the sun and rain, and the nature of the climate, in order to enable the jury to determine how far the plaintiff's sickness was caused by the defendant's negligence. And that in estimating the damages it was proper for them to consider the time the plaintiff lost by the sickness, his expenses caused thereby, not only before but after his return home, so far as it resulted from the defendant's fault.[8] And

[5] Hood *v.* N. Y. & N. H. Railw. Co., 22 Conn. 1.

[6] *Ante*, § 181. But in Connecticut it has been held, that such a contract by a railway company is *ultra vires*. *Ante*, § 181.

[7] Page *v.* New York Central Railw., 6 Duer. 523. If the passenger in such case having discovered the mistake in season to return and take the proper route, is permitted to do so without charge, but refuses to leave the cars, or pay his fare on the route he is travelling, he may be expelled from the cars.

[8] Williams *v.* Vanderbilt, 28 N. Y. 217. The point is thus stated in the report of the case. In an action against a common carrier of passengers to recover damages for the failure of the defendant to carry the plaintiff from New York to San Francisco via Lake Nicaragua, according to his agreement; for neglect of duty in not providing suitable accommodations, &c., for delay and detention on

the plaintiff may prove his skill, as a bookkeeper, and by parity of reason, in any other profession, to enable the jury to estimate his loss.[9]

8. In order to enable the plaintiff to recover special damages claimed to have been sustained by reason of the failure of the defendant to perform promptly, and according to its terms, a contract to carry him as a passenger, it must appear clearly, and by affirmative proof, that the damages were sustained, without any fault on his part, and in spite of his utmost efforts to avoid them.[10]

the route, and for sickness caused by unnecessary detention in an unhealthy climate, &c.; *held* that it was entirely proper for the judge to receive evidence as to how much the plaintiff was exposed to the sun and rain while crossing the Isthmus, and to show that the climate there was bad and unhealthy, so that the jury could determine whether the plaintiff's sickness was caused by defendant's negligence and breach of duty.

Held also that the time the plaintiff lost by reason of his detention on the Isthmus, his expenses there and of his return to New York, the time he lost by reason of sickness after his return to New York, and the expenses of such sickness, so far as the same were caused by defendant's negligence or breach of duty, were legitimate damages which plaintiff was entitled to recover.

[9] Yonge *v.* Pacific Mail Steamship Co., 1 Cal. 353.

[10] Benson *v.* New Jersey Railway & Transp. Co., 9 Bosw. 412. The point is thus stated in the report of the case: In an action against a carrier of passengers, to recover damages for a failure to carry the plaintiff within the appointed time, to the place for which he had taken passage, by reason whereof he did not perform his errand there, and was detained at expense and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time he could have done his business and would have promptly returned, or that he could not, with due effort, accomplish his errand by reason of the delay in arriving. Nor can the plaintiff, in such action, recover for his expenses and the damages to his business during a sojourn of several days, without some proof as to the time when he first ascertained that he could not accomplish his errand and might therefore return.

The fact that his errand was to receive a sum of money previously promised him as a loan, and that, not receiving it, he was without means to defray the expenses of returning until he received it, is not sufficient to excuse his delay, if he made no effort to borrow, and does not show that there was any difficulty in the way of his doing so.

SECTION VII.

What will excuse Company from Carrying Passengers.

1. *Company not bound to carry where carriages full.*
2. *But must carry according to terms which they advertise.*
3. *Not bound to carry disorderly persons, or those otherwise offensive.*
4. *Carrier liable in tort for breach of duty aside from contract.*
5. *Purchase of ticket does not constitute a contract.*
6. *Company has a right to impose reasonable regulations as to carriage of passengers.*

§ 198. 1. It would seem, upon general principles, that railway companies might excuse themselves from carrying passengers beyond their present means, if they were adequate to all ordinary occasions, and they had no reason to expect an increased press of travel at that particular time. But it should undoubtedly be an extreme case to justify an absolute refusal to carry a passenger, since it could scarcely be supposed ever to occur, that a railway, in any sense properly equipped for the purpose of carrying passengers and freight, should not be able to meet all emergencies in some way. And if the occasion were unusual, it might excuse some discomfort in the mode of conveyance.

2. But it is said by *Patteson*, J., in one case, where the company had issued an excursion ticket, stipulating to run trains in a given mode, that they could not excuse themselves, by showing the carriages were all filled.[1] The learned judge said: "They

[1] Hawcroft *v.* Great Northern Railw., 16 Jur. 196; s. c. 8 Eng. L. & Eq. 362. In regard to the general duty and liability of common carriers of passengers, or those who held themselves out as such, see *ante*, § 192. It is said to have been held by some court, in the case of Foland *v.* Hudson River Railw., that a passenger who is not furnished with a seat is not obliged to pay fare, and if he is expelled from the cars for refusing such payment may sustain an action against the company. Such a rule must require much qualification. If the passenger is not accommodated in a manner which he deems a fair compliance with the duty of the company as passenger-carriers, he may decline any compromise and resort to his action against the company for refusing to carry him, as their contract by the ticket or their duty required. And he might, no doubt, sustain such action, unless the company proved some just excuse. But if he chooses to accept of a passage without a seat, the general understanding undoubtedly is, that he must pay fare. But if he goes upon the cars expecting proper accommodations, and is put off because he declines going in that mode, he may still resort to his action.

should have made it a condition of their contract, that they would not carry unless there was room." By the by-laws established by the Board of Trade, in regard to railways in England, every passenger is required to book his place and pay his fare when he receives his ticket, and this is subject to the condition that there shall be room in the train, for which he is booked. If not, those booked for the greatest distance have the preference.[2]

3. But it has never been considered in this country, that passenger-carriers in any mode were bound to receive passengers who refused to conform to their reasonable regulations, or were not of quiet and peaceful behavior, or for any reason not fit associates for the other passengers, as if infected by contagion, or in any way offensive in person or conduct.[3] But where the carrier of passengers has no reasonable excuse, he is bound ordinarily to carry all that offer.[4] And this has been regarded as a duty, growing out of the employment of common carriers of passengers, and altogether independent of the contract between the parties, but which may undoubtedly be controlled by contract.[5]

4. The liability of a common carrier results from his duty to carry all freight and passengers which offer within the range of his usual business, and he is liable in tort both in form and in substance as for a breach of duty aside from and independent of all express or implied contract.[6]

5. The mere purchase of a ticket for a railway journey does not amount to a contract on the part of the company, or impose upon the company a duty to have a train ready to start at the time the passenger is led to expect one.[7]

[2] Hodges on Railways, 553; *ante*, § 26, n. 6.

[3] Jencks *v.* Colman, 2 Sumner, 221; Markham *v.* Brown, 8 N. H. 523. In these cases the persons excluded were in the interest of rival lines of carriers, and at the time engaged in the promotion of such interests.

[4] Hollister *v.* Nowlen, 19 Wendell, 239; Bennett *v.* Dutton, 10 N. H. 486, where the subject is very elaborately and satisfactorily discussed by Mr. Ch. Justice *Parker*. Galena & Chicago Railw. *v.* Yarwood, 15 Ill. 472.

[5] Bretherton *v.* Wood, 3 Bro. & Bing. 54; s. c. 9 Price, 408.

[6] Tattan *v.* Great Western Railw., 2 El. & El. 844. But a master cannot recover of the company for the loss of service of his servant when the servant purchased the ticket. Alton *v.* Midland Railw. Co., 19 C. B. (N. S.) 213; s. c. 11 Jur. (N. S.) 672.

[7] Hurst *v.* Great Western Railw., 19 C. B. (N. S.) 310; s. c. 11 Jur. (N. S.) 730. This was where the trains did not connect by reason of the train on the first portion of the line being delayed, and the passenger thereby being put to

6. And a railway company have the right to prescribe reasonable conditions for the admission of any passengers on their freight trains; and the payment of fare to its office agents, or procuring a ticket before taking passage on such trains, is not an unreasonable condition.[8] An offer to pay fare to an employee on the train, not authorized to receive it, is not an offer to the company, and in such cases does not entitle the party to a place on such train as a passenger.[8] And when a person has purchased a ticket and taken his passage on a train, and given up his ticket to the conductor, he cannot at an intermediate station, by virtue of his subsisting contract, leave such train, while in the reasonable performance of the contract, and claim a seat upon another train.[8]

expense in staying over night, and it was held there was no absolute contract to make the connection, and the passenger must run the risk of reasonable contingencies. The time-bills here were not put in the case, and the court held that the ticket alone only bound the company to carry the passenger through in a reasonable time. The time-bills will bind the company to their fulfilment. *Ante*, § 197, n. 2.

But where the company state in their bills that all reasonable effort will be made to have trains arrive as advertised, but punctuality will not be guaranteed, and the jury find the company guilty of no negligence, the passenger cannot recover for any failure to arrive in the time named in the bills and time-table. Prevost *v.* Great Eastern Railw., 13 L. T. (N. S.) 20, before *Crompton*, J., at *Nisi Prius*.

[8] The Cincinnati, Columbus, & Cleveland Railw. *v.* Bartram, 11 Ohio (N. S.), 457.

SECTION VIII.

Rule of Damages for Injuries to Passengers.

1. *All damage, present and prospective, is recoverable.*
2. *But these should be obvious, and not merely conjectural.*
3. *New trials allowed for excessive damages.*
4. *But this only allowed in extreme cases.*
5. *Counsel fees not to be considered.*
6. *Some English judges doubt if damages should be claimed as compensation for pain.*
7. *Not so viewed generally.*
8. *Plaintiff may show value of his time lost.*
9. *Generally rests very much in discretion of jury.*
10. *In actions for loss of service, cannot include mental anguish.*
11. *Woman claiming damages for personal injury cannot prove state of her family or death of husband.*
12. *Refusal of court to set aside verdict for excessive damages.*
13. *The right to damages question of law: the amount, one of fact.*
14. *Chief Baron* Pollock's *commentary on these questions.*
15. *Special damages cannot be recovered unless alleged and proved.*
16. *Plaintiff who claims damages for loss of time and business may prove nature of business and probable profits.*
17. *Mother recovers pecuniary loss, by death of infant child during minority, but nothing for shock to feelings.*

§ 199. 1. The question of damages is one resting a good deal in the discretion of a jury, and must of necessity be more or less uncertain. But certain general rules have been established upon the subject. It is settled that the party must recover all his damages, present and prospective, in one action.[1]

2. But in another case,[2] it was said by the court, "It was certainly proper for the jury, in estimating the damages to the plaintiff, to regard the effect of the injury in future, upon her health, the use of her limbs, her ability to labor and attend to her affairs, and generally to pursue the course of life she might otherwise

[1] Hodsoll *v.* Stallebrass, 11 Ad. & Ellis, 301; Whitney *v.* Clarendon, 18 Vt. 252; Curtis *v.* Rochester & Syracuse Railw., 20 Barb. 282; Black *v.* Carrollton Railw., 10 Louis. Ann. 33.

[2] Curtis *v.* Rochester & Syracuse Railw., 20 Barb. 282. See also Morse *v.* Auburn & Syracuse Railw., 10 Barb. 621.

In the case of Hopkins *v.* Atlantic & St. Lawrence Railw., 36 N. H. 9, it was held, that in an action by the husband for an injury to the wife, through the negligence of the company, the plaintiff may give evidence of expense of cure and loss of services, after the commencement of the action, as well as before; and the jury may give prospective damages also. The jury may also give exemplary damages, in their discretion, where the injury was caused by the gross negligence of the company in the management of their trains.

have done," and its effect in producing bodily pain and suffering, but all these should be "the legal, direct, and necessary results of the injury, and those, which at the time of the trial were prospective, should not be conjectural."

3. Courts will sometimes grant new trials for excessive damages in such cases, as where the statute limited the amount of recovery in case of death to $5,000, and the jury assessed damages in a case of injury, not resulting in death, at $11,000, the court ordered a new trial, unless the excess above $5,000 should be remitted in twenty days.[3]

4. The rule laid down by *Kent*, Ch. J., as justifying a new trial for excessive damages is, that they should be so excessive "as to strike all mankind, at first blush, as beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, corruption, or prejudice."[4] This is no doubt a safe rule, and perhaps the only safe one in such cases, but there are probably many cases where new trials have been granted for this cause, falling far short of this in excessiveness.

5. In some of the American States, in trials at *Nisi Prius*, in conformity with a single English case, the plaintiff has been allowed to add to his actual damages of loss of time, expense of cure, pain, and suffering, and prospective disability, if any,— counsel fees not recoverable by way of taxable costs.[5] But this does not seem to be countenanced by the English courts in the later decisions.[6]

[3] Collins *v.* Albany & Schen. Railw., 12 Barb. 492. So where six thousand dollars was awarded for a broken leg, of which the party recovered in about eight months, a new trial was granted. Clapp *v.* Hudson River Railw., 19 Barb. 461. But where the plaintiff had been disabled for two years, and the injury seemed likely to be permanent, $4,500 was held not exorbitant. Curtis *v.* Rochester & Syracuse Railw., *supra*.

And where the plaintiff was wrongfully expelled from the cars, between regular stations, and the jury gave $1,000 damages, a new trial was granted on the ground they were excessive, no special damage being shown. Chicago, Burlington, & Quincy Railw. *v.* Parks, 18 Ill. 460.

[4] Coleman *v.* Southwick, 9 Johns. 45. See also Southwick *v.* Stevens, 10 Johns. 443.

[5] *Shaw*, Ch. J., in Barnard *v.* Poor, 21 Pick. 381. But this rule is here condemned, and also in Lincoln *v.* Saratoga & Sch. Railw., 23 Wend. 435.

[6] Grace *v.* Morgan, 2 Bing. (N. C.) 534; Jenkins *v.* Biddulph, 4 Bing. 160; Sinclear *v.* Eldred, 4 Taunt. 7. The only English case where this claim is coun-

6. In a recent English case, a distinguished judge, Ch. B. *Pollock*, says: "A jury most certainly have a right to give compensation for bodily suffering unintentionally inflicted. But when I was at the bar I never made a claim in respect of it, for I look on it not so much as a means of compensating the injured person, as of damaging the opposite party. In my personal judgment it is an unmanly thing to make such a claim. Such injuries are part of the ills of life, of which every man ought to take his share." [7]

7. The principle of this remark seems to be conceived in a more philosophic and Christian temper than would be altogether consistent with bringing any action at all. But it is sometimes refreshing to find minds soaring above the dead level of pecuniary equivalents to which the profession are for the most part doomed, in connection with estimating the damages to be awarded for personal injuries. But it has always been held in this country that the bodily pain and suffering caused by an injury for which one party is legally entitled to claim compensation of the other, were legitimate elements to be proved and considered by the jury in estimating the pecuniary compensation which they shall award, notwithstanding the difficulty of reducing pain and pence to a common measure.[8]

8. It has been held the plaintiff might give evidence of the nature of his business and the value of his services in conducting it, as a ground of estimating damages by an injury through the negligence of the company, but not the opinion of witnesses as to the amount of his loss.[9]

9. In actions against carriers of passengers for injuries, there seem, as we have said, to be no well-defined rules for estimating damages. It is a matter to be submitted to the sound discretion and judgment of the jury who are to consider the actual loss to

tenanced, is Sandback *v.* Thomas, 1 Stark. 306. See Webber *v.* Nicholas, 1 Ryan & M. 419.

[7] Theobald *v.* Railway Passengers' As. Co., 10 Exch. 45; s. c. 26 Eng. L. & Eq. 438. But see Curtis *v.* Rochester & Syracuse Railw., 20 Barb. 282, where the rule of the American law upon the subject is fully stated, as cited in the text (2). Damages arising from this source need not be specially stated in the declaration, unless of an unusual and unexpected character. Ib. *Ante*, § 176, n. 15; § 179, n. 2, 5.

[8] Ransom *v.* New York & Erie Railw., 15 N. Y. 415; Penn. Railw. *v.* Allen, 53 Penn. St. 276.

[9] Lincoln *v.* Saratoga & Sch. Railw., 23 Wend. 425.

the plaintiff, present and prospective, which is the very lowest amount they will feel justified in giving in any case. Beyond this any rule for damages must be regarded as more or less *terra incognita*. There is no doubt juries often give damages altogether beyond any actual damage which it is supposed the party has sustained in a pecuniary point of view. And it is not uncommon, in charging juries upon this subject, to bring their attention, in considering the question of damages, to the degree and character of the misconduct of the defendants or their agents, and even to the public example of the trial and verdict. This has been sometimes seriously criticised by elementary writers, and sometimes, as we have seen, by judges, but we find no cases where new trials have been granted on account of such suggestions having been given in charge to the jury. And when it is considered that verdicts in civil actions are the only effectual corrective of a most flagrant disregard of human life, which often occurs in the transportation of passengers, we are not prepared to say that the jury are bound altogether to shut their eyes to the public example of their verdicts.[10]

10. In an action [11] by the father for loss of service from an injury to his infant son fourteen years of age, it was held that no damages could be given for the shock to the father's feelings, that being a proper consideration only in an action in the name of the son for the direct injury.[11]

[10] Farish *v.* Reigle, 11 Grattan, 697.

[11] Black *v.* Carrollton Railw., 10 Louis. Ann. 33. And in the case of Coakley *v.* North Pennsylvania Railw., 10 Am. Railw. Times, No. 12, 6 Am. Law Reg. 355, tried in the city of Philadelphia, for the death of a child fourteen years of age, by a collision of trains upon defendants' road, the court adopted a similar view in regard to the rule of damages. They said it was not a case for exemplary damages; the jury were to take into consideration the pecuniary services of the child until of age, and the expense incurred by the plaintiff after the accident, and the value of the society of the child, which might be regarded as the strongest claim. But they were not to consider the anguish of the parents, nor were they to inquire what a man would take for a child, for this would be speculative damages, and in this view, the value of human life is beyond all price.

The rule thus laid down is perhaps about as accurate as any one could give. But it is evident it will not bear strict analysis. For how can one estimate the value of the society of a child to a parent, and not consider the mental anguish consequent upon the death? It is the same thing under different forms of speech.

All that can properly be said is, that the question of damages, within reason-

11. In an action in favor of a woman for damages sustained by the negligence of a railway company at a road-crossing, the death of plaintiff's husband by the same accident, or the fact that she has dependent children is not admissible in evidence to increase the damages.[12]

12. Where in such case the plaintiff lost one arm and the use of the other, and was otherwise severely bruised and injured, so as greatly to impair health and memory, and be in constant pain, and she had at three successive trials recovered $10,000, $18,000, and $22,250, respectively, the two first of which verdicts were set aside for errors in law, the court refused to set aside the third verdict on the ground that the damages were excessive.[12]

13. There is a recent case[13] in the Court of Exchequer, where the question of the remoteness of damage recoverable in open actions is very carefully considered and judiciously treated. *Pollock*, Ch. B., said, "We apprehend where the facts are known, it is the province of the court to say for what matters damages are to be given; but the amount of damage is a question for the jury quite as much as the credit due to the witnesses.

14. The learned judge here passes a most unqualified encomium upon Hadley *v.* Baxendale,[14] as having been most carefully considered and wisely determined, and as having settled all questions coming within the range of its compass. The words of his lordship in regard to the proper province of a jury in determining a question of damages, and the proper latitude to be allowed them, are worthy of repetition here, if we had space, and of grave consideration and remembrance wherever they have any just application.

15. In actions against common carriers, only such damages as necessarily result from the wrongful act can be recovered, unless special damages are alleged and proved.[15] Consequently, where an unmarried woman received serious injury by the upsetting of a

able limits, rests entirely in the discretion of the jury. They are to be watchful that their verdict shall not be so inadequate to the injury as to appear like a denial of justice, nor so extravagant as to indicate that they have assumed the office of avengers of the plaintiff's wrongs, without due consideration of any apology for the defendants' conduct, which to some extent exists in all cases.

[12] Shaw *v.* Boston & Worcester Railw., 8 Gray, 45.

[13] Wilson *v.* Newport Dock Co., 4 H. & C. 232; s. c. Law Rep., 1 Exch., 177; 12 Jur. (N. S.) 233.

[14] 9 Exch. 341.

[15] Hunter *v.* Stewart, 47 Me. 419.

passenger-carriage, through the want of due care on the part of the carrier, it was held that no additional damages could be awarded on account of lessened prospect of marriage thereby, such damages not being specially claimed in the declaration or sustained by the evidence; upon either of which grounds the recovery was equally precluded.[15]

16. It is generally permitted for the plaintiff who claims to recover for loss of time, or loss of business, to prove the nature and extent of his business, and the probable profits arising therefrom, in order to enable the jury to form a correct estimate of his loss.[16]

17. Where the mother is to be compensated for the injury or loss consequent upon the death of her infant child, the shock or suffering of feeling is not to be taken into the account, but only the pecuniary loss, and that is not to be extended beyond the minority of the child.[17] But the limitation of damages to the minority of the child seems very questionable. The exclusion from consideration in estimating damages of the suffering in feelings of the mother, has been usual under the English statute, and most of the American statutes are copied from that.

SECTION IX.

Carriers of Passengers and Goods Cannot Drive within the Precincts of a Railway Station.

§ 200. 1. We have already shown that it is competent for railways to make by-laws regulating the conduct of passengers, and the use of stations, and other matters concerning the traffic.[1] It seems to be considered by the English courts, that even in a case where passengers, by the existing statutes and by-laws of the company applicable to the subject, have the right to insist upon coming upon the grounds adjoining the stations of the company, and even where the company generally allow omnibus drivers and other passenger carriers to come within the precincts of their stations without objection, that a particular carrier of passengers, who

[16] Hanover Railw. *v.* Coyle, 55 Penn. St. 396. See also Hyatt *v.* Adams, 16 Mich. 180; McIntyre *v.* N. Y. Central Railw., 37 N. Y. 287.

[17] State *v.* Baltimore & Ohio Railw., 24 Md. 84; *ante*, § 195.

[1] *Ante*, §§ 26, 27, 28.

was excluded from this privilege had no ground of action against the company on that account.[2] But in a later case,[3] where one was so excluded from driving his omnibus upon the grounds of the company in the same manner as other carriers of a similar character were allowed to do, no special circumstances being shown to justify the particular exclusion, it was held that the court, under the English Railway Traffic Act, might enjoin the company to admit the person excluded with his vehicle in the same manner and to the same extent to which they admitted others of a similar description. But the companies are not in England prohibited from giving a preference to certain cab-owners, either for compensation or other consideration, to come within their grounds, and excluding others.[4] The complaint must come from those who use the railway, and be a *bona fide* complaint on behalf of the public interest.[5]

[2] Barker *v.* Midland Railw. Co., 18 C. B. 46; s. c. 36 Eng. L. & Eq. 253. This case is put by the court upon the ground of want of privity in contract, and also, that the grounds adjoining railway stations are not dedicated to public use in any such sense as to become a public highway for carriages.

The 2d section of the English "Railway and Canal Traffic Act, 1854," 17 & 18 Vict. c. 31, provides, that railway companies shall afford reasonable facilities for receiving and forwarding traffic, without any preference or advantage to particular persons. The court in this case intimate, that even if the company are liable, under this act, for the injury here complained of, the party must pursue the specific remedy given by the statute. *Willes*, J., said: "The action is founded upon the supposed duty of the defendants to let the plaintiff come on their lands, and it is suggested that the duty arises from the fact of their allowing the public generally to come on it; but it is not stated that the defendants have dedicated the place to the public use, so as to make it public. Then it is said that it is the duty of the defendants, as carriers, to allow persons to bring passengers and goods into the station. But it would be rather extraordinary, if a person, to whom no direct duty was due by the company, could maintain an action, when the passengers could not, because it is not averred that they were ready and willing to pay the fare, which is essential. Pickford *v.* Grand Junction Railw. Company, 8 M. & W. 372. But the action is not maintainable, also, on another ground. A third person cannot bring an action for the result of a breach of duty towards another person. The last case of that kind was where a passenger, by a coach, brought an action against the coach-maker for a breakdown. If such actions were permitted, the courts would be inundated with them."

[3] Marriott *v.* London & Southwestern Railw., 1 C. B. (N. S.) 499; s. c. 40 L. & Eq. 250.

[4] Beadell *v.* Eastern Counties Railw., 2 C. B. (N. S.) 509.

[5] Painter *v.* London, Brighton, & South Coast Railw., id. 702.

SECTION X.

Duty Resulting from the Sale of Through Passenger Tickets, in the Form of Coupons.

1. *Not the same as where goods and baggage are ticketed through.*
2. *It is to be regarded as a distinct sale of separate tickets for different roads. They may be used when the holder elects.*
3. *The first company are to be regarded as agents for the others.*
4. *If the business of the entire line is consolidated, it is different.*
5. *But in general it is not regarded as a case of partnership.*
6. *The companies being in different States and kingdoms makes no difference.*
7. *First company held liable for baggage not checked.*
8. *So for an injury, occurring on another line, over which they had sold tickets.*
9. *A stage route intersected by a ferry, hired to carry the coaches over, is responsible for the safety of passengers on the ferry.*

§ 201. 1. As the general duty of common carriers of passengers is different from that of common carriers of goods, so the implied contract, resulting from the sale of through tickets for passengers is different. In the case of carriers of goods, and the baggage of passengers, we have seen that taking pay and giving tickets or checks through, binds the first company ordinarily for the entire route.[1]

2. But in regard to carrying passengers the rule is different, we apprehend. These through tickets, in the form of coupons, which are purchased of the first company, and which entitle the person holding them to pass over successive roads, with ordinary passenger baggage, sometimes for thousands of miles, in this country import, commonly, no contract with the first company to carry such person beyond the line of their own road. They are to be regarded as distinct tickets for each road, sold by the first company, as agents for the others, so far as the passenger is concerned; and unless the first company check the baggage beyond their own line, it is questionable, perhaps, how far they are liable for losses happening beyond their own limits.[2] And where a person procured a

[1] *Ante*, §§ 171, 172; McCormick *v.* Hudson River Railw., 4 E. D. Smith, 181.

[2] Sprague *v.* Smith, 29 Vt. 421; Hood *v.* New York & New H. Railw., 22 Conn. 1; s. c. id. 502. When this case last came before the court, held, that the defendants were not estopped from denying that under their charter they had power to enter into a contract to carry passengers beyond their own road. But in this respect the case stands alone, probably, at present. See Ellsworth

ticket in coupon form, over two distinct railways, and delayed two months at the end of the first railway, before resuming his journey, it was held, that being printed on separate pieces of paper and containing no restrictions, they were to be regarded as separate vouchers or contracts for distinct passages, and the delay did not affect the rights of the holder.[3] We apprehend that this is the general understanding in regard to the rights of the holders of such tickets. The only question which could fairly occur in case of any considerable delay between the different lines would be that it might justify requiring some explanation.

3. And the contract which exists between the companies, commonly, in regard to the division of the price of the through tickets, constitutes no such partnership as will render each company liable for injuries or losses occurring upon the whole route. The first company is, in such case, viewed as the agent of the other companies, and the transaction requires no different construction from one where the tickets of one company are sold at the stations of other companies, which is not very uncommon, and would never be regarded in any other light than that of agency merely.[2] But the passenger taking separate tickets, for different portions of the line, will not preclude him from showing by oral proof, that the contract with the first company extended to the entire route. And this may also be established by circumstances attending the transaction.[4]

4. We are aware that in regard to consolidated lines of travel, consisting of different companies, or natural persons, originally, where the entire fare is divided ratably, and all losses are deducted, it has been held to constitute such a partnership as to render them all liable to third persons.[5]

5. But in a recent case, where the subject seems to have been a good deal examined, the rule is thus laid down:[6] "If the several

v. Tartt, 26 Ala. 733; *ante*, §§ 171, 172; Straiton *v.* New York & New H. Railw., 2 E. D. Smith, 184. In this last case it was held, that each company is only liable for the losses on its own line.

[3] Brooke *v.* Grand Trunk Railw., 15 Mich. 332.

[4] Van Buskirk *v.* Roberts, 31 N. Y. 661.

[5] Champion *v.* Bostwick, 11 Wend. 572; s. c. 18 Wend. 175. See also Carter *v.* Peck, 4 Sneed, 203.

[6] Ellsworth *v.* Tartt, 26 Ala. 733. And a similar rule is adopted in Briggs *v.* Vanderbilt, 19 Barb. 222, in regard to passenger transportation between New York and San Francisco, the line consisting of three independent companies,

proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not of itself constitute them partners, as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line."

6. Contracts made in this mode are binding upon all the companies, and it will make no difference that they are in different states or kingdoms.[7] And if one carrier so issue his tickets, or in other respects so conduct, as to have purchasers understand that he undertakes personally for the entire route, he will be held responsible to that extent.[8]

7. And where an excursion ticket is issued in Boston by a railway company terminating there, marked "from Boston to Montreal," with coupons attached for the connecting roads, marked in the same manner, the passenger purchasing the same, and delivering his baggage to the agent of the first company and demanding a check, the agent refusing to give the check, but giving assurances that such baggage would be perfectly safe, as he, the baggage-master, was going through the entire route, was held by the Supreme Judicial Court of Massachusetts, entitled to recover for the loss or non-delivery of such baggage at the termination of the route.[9]

8. In a recent English case,[10] where the first company sold a

who had no common interest in the business throughout the route, although they advertised together, as one line. And in this case, where the defendant gave the plaintiff a ticket for a passage by a particular ship, which had already been wrecked, without the knowledge of either party, it was held the defendant was liable for the money received for the ticket, in an action for money had and received, as for the failure of the consideration for which the payment was made. See also Northern Cent. Co. *v.* Scholl, 16 Md. 331.

[7] Cary *v.* Cleveland & Toledo Railw., 29 Barb. 35.

[8] Quimby *v.* Vanderbilt, 17 N. Y. 306. His being an owner in the different portions of the route, and advertising it as his route, are circumstances justly tending to show a personal undertaking for the entire route.

[9] Najac *v.* Boston & Lowell Railw. Co., 7 Allen, 329.

[10] Great Western Railw. Co. *v.* Blake, 7 H. & N. 987; s. c. 8 Jur. (N. S.) 1013. In this case the plaintiff purchased a ticket in London, and paid one fare to Milford, in Pembrokeshire, and took one ticket for the entire route, as is the English custom. The line of the Great Western Company, of whom the plaintiff purchased his ticket, extends a short distance beyond Gloucester, and from thence to Milford the line belongs to the South Wales Company. By arrangement between the two companies the line is worked together, and the

ticket through an entire line, composed of different companies worked in connection, and the same carriage going through, it was held they thereby assumed the responsibility of assuring the track to be kept in working condition throughout the entire route; and where the passenger was injured upon the track of another company, by the train coming in collision with a stationary engine left on the track by the servants of that company, without any fault of the driver of the train, it was held the first company were responsible.

9. Where a line of passenger transportation by stage coaches was intersected by a ferry not belonging to the passenger carriers, but hired to carry their coaches over, it was held the stage company were responsible for the negligence or misconduct of the ferry company and its servants, as being, for the time, their agents and servants.[11]

SECTION XI.

How far the Declarations of the Party are Competent Evidence.

1. *Are competent to show state of health, in connection with other facts.*
2. *But not to show the manner in which the injury occurred.*
3. *Exposition of the just application of the rule admitting declarations as part of the* res gestæ.

§ 202. 1. In trials for injuries to passengers, it has been allowed to show the plaintiff's complaints of the state of his health, and that he has not labored at his trade, being poor, and having a considerable family.[1] And statements made by a patient to his physi-

fares divided between them. The plaintiff was conveyed by the same carriage until he entered upon the line of the second company, when it came into collision with an engine left upon the track, by the servants of the latter company. There was no negligence on the part of the driver of the train. It was held that the first company was responsible to the plaintiff, since, under the circumstances, there was an implied obligation on their part to maintain the whole line in a fit condition for safe passage.

[11] McLean *v.* Burbank, 11 Minn. 277.

[1] Caldwell *v.* Murphy, 1 Duer, 233; s. c. 1 Kernan, 416; 1 Greenl. Ev. § 102; Aveson *v.* Kinnaird, 6 East, 188; Bacon *v.* Charlton, 7 Cush. 581. In an action for damage sustained through defects in a highway, it is not competent for the plaintiff to give evidence of his declarations to his physician, in regard to the cause of the injury for which the physician was consulted. Chapin *v.* Marlboro, 20 Law Rep. 653, in Supreme Court of Massachusetts. Nor in an action for damages, by reason of collision between two carriages upon the highway, can

cian, for the purpose of receiving medical advice, in regard to the character and seat of his sensations, have been held competent evidence in his favor, in an action to recover damages for the personal injury which was the alleged cause of the malady or illness, even where such statements were made preceding the action.[2]

2. But in practice at *Nisi Prius*, it has generally been considered inadmissible to show the statements of the party injured, in regard to the manner in which the injury occurred, as, for instance, the manner of driving, or the rate of speed, the declaration of the party being competent only as to invisible and insensible effects of the injury, such as bodily and mental feelings, which are of necessity shown by the usual and only modes of expression applicable to the subject.[1]

3. But the declarations of the engineer having charge of the train, and made at the time an injury occurs, have been received as evidence in an action for negligence against the company, as part of the *res gestæ*.[3] There can be no doubt of the soundness of this general proposition. But we think courts and text writers are very much in danger of extending the rule to declarations, made at the *time* of the transaction, although forming no part of it. The declaration to constitute a part of the transaction must not only be made at the time the event is transpiring, but it must be made for the purpose of qualifying or giving character to some act then doing, and unless it is of this latter character it is no more admissible for being made at the time of the transaction than if made at any other time. And such it seems to us was the character of the declarations of the engineer that the train arrived at the crossing behind time, which were admitted in this case.[4]

the plaintiff give evidence of the declarations of defendant's servant, that the plaintiff was not in fault, made at the time of the accident, and while the defendant was being extricated from the carriage. Lane *v.* Bryant, 20 Law Rep. 653.

[2] Barber *v.* Merriam, 11 Allen, 322.

[3] Hanover Railw. *v.* Coyle, 55 Penn. St. 396.

[4] 1 Greenl. Ev. § 108 and note, § 108 a.

SECTION XII.

Passengers Wrongfully Expelled from Cars.

1. *Company not held liable for exemplary damages unless they ratified the expulsion.*
2. *But upon principle the company should be liable for special damage.*
3. *Are trespassers if they refuse to deliver baggage in such cases.*
4. *Company must keep strictly to the terms of any by-law regarding the production of tickets when called for.*
5. *Conductors bound to exclude disorderly or offensive persons.*
6. *One wrongfully expelled from the cars, not entitled to special damages, unless it occurs clearly without his fault.*
7. *Where ticket lost, person liable to pay fare.*
8. *One wrongfully put on shore, by a passenger boat, short of his destination, may show, to enhance damages, that it was done in an insulting manner.*

§ 203. 1. It has been held that a passenger who was wrongfully expelled from the company's cars, after having surrendered his ticket, the conductor not crediting his statement, was not entitled to recover vindictive or punitive damages against the company, unless they expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed.[1]

[1] Hagan *v.* Providence & Worcester Railw., 3 Rhode Island, 88. This was an action on the case, and the rule of damages given to the jury, approved in the Superior Court, was, "That all damages for actual injury, loss of time, pain of body, money paid for employment of physician, or injury to the feelings of defendant, might be allowed." This is as far as most cases go, in this form of action, unless in slander and libel; and it has been seriously questioned, how far damages in any case should be given for exemplary or punitive purposes. But in practice, that has more commonly been allowed, when the party acts in bad faith, and from feelings of vindictiveness. And in the case of railway companies, who are incapable of such motives personally, it is rather intimated, in the case cited above, that they would never be liable for such damages, unless upon some formal ratification of the act of their agent. But, upon principle, it would seem that if the agent was so situated as to represent the company in the particular transaction, and for the time, they should be liable to the same rule of damages as the agent, although the form of action may be different.

If the act is that of the company, they should be held responsible for all its consequences, and there seems quite as much necessity for holding the company liable to exemplary damages as their agents. It is difficult to perceive why a passenger, who suffers indignity and insult from an inexperienced or incompetent conductor of a train, should be compelled to show the actual ratification of the act of the conductor, in order to subject the company to exemplary damages, if the transaction was really of a character to demand such damages, and the company are liable at all. It would rather seem that the reasoning of the court,

2. But no doubt if one were put out of the cars wrongfully, and thereby suffered serious detriment in his business, he might be entitled to recover special damages, but not probably without declaring specially in regard to such damages.

3. Where a ship-owner refused to carry a passenger, whom he had engaged to carry, and proceeded on the voyage without giving the passenger reasonable opportunity to remove his baggage, or with the intent to carry it beyond his reach, it was held, that he thereby terminated the contract of carriage, and was liable in trespass.[2]

4. Where the company have a by-law or regulation by which passengers are bound to produce their tickets when required so to do, they must bring themselves strictly within the terms of the by-law. And where the by-law provided that no passenger should enter any carriage of the company, or ride therein without first paying fare and procuring a ticket, which he is to show when required, and to deliver up before leaving the carriage, and the master procured tickets for himself and his servants, which were allowed to enter the carriages upon the master telling the guard he had tickets for them, without the servants being required to produce them, each for himself, it was held the master might recover for the expulsion of the servants for not producing their tickets.[3]

5. The conductor of a street railway car may exclude or expel from the car, any person, who by reason of intoxication or otherwise is in such a condition as to render it reasonably certain, that his presence or continuance in the vehicle would create inconvenience or disturbance, or cause discomfort and annoyance to other passengers.[4] It is the duty of such passenger-carriers to take all reasonable and proper means to insure the safety, and provide for the comfort and convenience of their passengers, and for that purpose to repress and prohibit all disorderly conduct in

carried to its full extent, would show that the conductor, in that portion of his conduct which was tortious, did not represent the company at all. Upon the same principle it was at one time held, that a corporation is not liable to indictment for the misfeasance of its agents. *Post*, § 225.

[2] Holmes *v.* Doane, 3 Gray, 328.

[3] Jennings *v.* Great Northern Railw. Co., Law Rep. 1 Q. B. 7; s. c. 13 Law T. (N. S.) 231. See also Dearden *v.* Townsend, Law Rep. 1 Q. B. 10; s. c. 13 Law T. (N. S.) 323.

[4] Vinton *v.* Middlesex Railw., 11 Allen, 304.

the cars, and to expel or exclude therefrom persons whose conduct or condition is such as to make acts of impropriety, rudeness, indecency, or disturbance either inevitable or probable; and the conductor is not bound to wait until some act of violence, profaneness, or other misconduct has been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender.[5]

6. Where one gave half his ticket to another to enable him to ride upon it, and was expelled from the cars on the ground that he had not paid his fare, and left a pair of opera glasses behind, in the carriage, without asking to have them taken out, he was held not entitled to recover the value of the same, as special damages resulting from the assault.[6]

7. Where a season ticket was issued upon the condition that it should be shown to the conductor when demanded, and that no duplicate should be issued, and the same was accidentally lost, so that the holder could not produce it, he was held liable to pay fare.[7]

8. It has been held, that where a passenger is put on shore short of the port of destination under circumstances of indignity and insult calculated to wound his sensibility, he is entitled to show the circumstances of his disembarkation and the language used by the captain, as a ground for enhancing damages.[8]

SECTION XIII.

Paying Money into Court, in Actions against Passenger Carriers.

1. *Payment into court in general count and tort, only admits damages to extent of sum paid.*
2. *But in cases of special contract, admits the contract and breach alleged.*

§ 204. 1. Where a declaration in tort is general, and without specification of the particulars of the cause of action, the payment of money into court admits a cause of action, but not the cause of

[5] *Bigelow*, Ch. J., in Vinton *v.* Middlesex Railw., 11 Allen, 306.
[6] Glover *v.* London & Southwestern Railw., Law Rep. 3 Q. B. 25.
[7] Ripley *v.* New Jersey Railw., 30 N. J. 388.
[8] Coppin *v.* Braithwaite, 8 Jur. 875.

action sued for, beyond the amount paid into court, and the plaintiff must give evidence before he is entitled to damages, beyond the amount paid into court.

2. But if the declaration be specific, so that nothing is due, unless the defendant admits the specific claim in the declaration, the payment of money into court admits the cause of action sued for,[1] both the contract and the breach of it.

SECTION XIV.

Liability where one Company uses the Track of Another.

1. *Statement of the facts of a case.*
2. *Company not liable to occasional passengers on freight trains for torts committed by employees of other roads.*
3. *Same liability toward passengers coming from other roads as in other cases.*
4. *And owe passengers same duty upon other roads as their own.*
5. *Railway responsible, on other roads, to same extent as the owners.*
6. *Responsibility measured by law applicable to case.*

§ 204 *a*. 1. In a recent case, the plaintiff had employed the defendants to transport cattle from Vermont to Boston, by their trains. By the custom of defendants, the plaintiff was allowed to go as a passenger, in a saloon car attached to the cattle train, without additional charge, to enable him to look after the cattle. The train, in its passage, went over the Northern New Hampshire Railway, that company furnishing the motive power, with their engineer and fireman, but the defendant's conductor continuing with this train through the route. While the train was passing over the Northern New Hampshire Railway, without any fault of those who had the management of it, but through the sole negli-

[1] Perren *v.* Monmouthshire Railw. & Canal Co., 17 Jur. 532; s. c. 20 Eng. L. & Eq. 258. The declaration here stated a contract to carry plaintiff from N. to E., and a negligent breach of duty in the performance of it, and damages. Plea, payment of £25 into court. Replication, damages *ultra*. Held, the negligence was admitted, and the plaintiff was entitled to recover all damages proved, even beyond the £25, without introducing proof to show defendant guilty of negligence on his part.

The general subject of the effect of paying money into court will be found examined to some extent in Hyde *v.* Moffatt, 16 Vt. 286; Bacon *v.* Charlton, 7 Cush. 581. See also, upon this general subject, Stapleton *v.* Nowell, 6 M. & W. 9; Fischer *v.* Aide, 3 M. & W. 486; Story *v.* Finnis, 6 Exch. 123; s. c. 3 Eng. L. & Eq. 548.

gence of the other servants and employees of the Northern New Hampshire Railway, the saloon car, which carried the plaintiff, was broken in by a collision with another train going in the same direction, and the plaintiff seriously injured.

2. It was held, that the undertaking of the defendants, in regard to carrying plaintiff, was of a limited and special character, and did not render them responsible for injuries which he might sustain by the misconduct of other parties;[1] that the plaintiff being aware, from the very nature of the transaction, that he would be exposed to perils of this character, must be supposed to undertake, upon his own part, to sustain that hazard, and could not justly be allowed to throw it upon an innocent party, who was known to him, at the time of entering into the contract, to have no control over the persons causing the plaintiff's injury.[2] And this case may be maintainable upon this latter ground, and the peculiar circumstances of the undertaking, but probably not upon general principles applying to passenger-carriers.[3]

3. In a recent case in Massachusetts, it was held, that a railway company, which receives the cars of another company upon its

[1] Sprague *v.* Smith, 29 Vt. 421. It was argued in this case, that, as the defendants' contract bound them absolutely to carry the freight, and the plaintiff went, as incidental to the main contract, the same kind of liability should be assumed in regard to him, if not to the same extent. But the plaintiff can in no sense be regarded otherwise than as a passenger. The same rule applies to agents and servants, and to negro slaves. United States *v.* The Thomas Swan (Dist. Court of U. S. Dist., South Carolina), before *Magrath*, J., 19 Law R. 201. There is the same difference between the liability of carriers always, for the person of a passenger and for his baggage. In the case of Sullivan *v.* Philadelphia & Reading Railw., 6 Am. Law Reg. 342; s. c. 30 Penn. St. 234, it is decided, that a railway company cannot excuse themselves as carriers of passengers where injury occurs in consequence of cattle straying upon the track, through defect of fences, which, as to the owners of the cattle, the company were not bound to maintain, because such act is a trespass against the company. It is the duty of the company to exclude cattle from their track for the security of their passengers. But this rule would not probably be extended to such acts of trespass as no reasonable foresight or caution could have anticipated or guarded against. *Ante*, § 127, n. 6.

[2] Bridge *v.* Grand Junction Railw., 3 M. & W. 244; Thorogood *v.* Bryan, 8 C. B. 115, 129. But the carrier is himself responsible for the acts and neglects of all persons, natural or corporate, who are employed in carrying out his undertaking, and they are, *pro hac vice*, his servants. Ryland *v.* Peters, Wallace, Philadelphia, 264.

[3] *Post*, pl. 4, and n. 5.

track, placing them under the control of its agents and servants, and drawing them by its locomotive power, assume towards the passengers the common liability of passenger-carriers,[4] and that it makes no difference, in regard to the liability of the company, to passengers passing over their road, whether they purchase tickets of them, or of any other railway company or agent, authorized to sell such tickets.[4]

4. But the rule of law in regard to passenger-carriers who run over other roads than their own, seems now to be pretty well established, that the first company is responsible for the entire route, and must take the risk of the negligence of the employees of the other companies.[5]

5. And in one case where cattle were injured by a train run by a company other than the owners of the line, running thereon by permission of the owners, and the animals came upon the track through defect of fences, which it was the duty of the owners of the line to build, it was held that the company running the train were responsible for the injury, although the owners of the line might also have been responsible for the same.[6]

6. Where a company took leave to run upon the line of another company under the general railway law of the State, by means of a lease of the second company, which was organized under the general railway law, the former company acting under a special statute, it was held that the responsibility of the first company in running the second company's road must be determined by the provisions of the general railway law and not by the special charter of the first company.[7]

[4] Schopman *v.* Boston & Worcester Railw., 9 Cush. 24.

[5] Railway Co. *v.* Barron, 5 Wall. 90; *ante*, § 201, pl. 8, and note. See Ayles *v.* Southeastern Railw., Law Rep. 3 Exch. 146.

[6] Ill. Central Railw. *v.* Kanouse, 39 Ill. 272.

[7] McMillan *v.* Mich. Southern & Northern Ind. Railw., 16 Mich. 79.

SECTION XV.

How the Law of the Place Governs.

1. *Corporations are only liable according to* lex loci.
2. *This in conformity with the general law.*
3. *Corporations must be judged by local law.*
4. *It was left to the jury to say what was reasonable under a special contract as to the time of shipping goods from a foreign country.*
5. *But in the absence of special contract the laws of the country to which the ship belongs will govern.*
6. *Where a collision occurs in a British port, the rights of parties will be settled by the law of that country.*

§ 204 *b*. 1. Corporations, as we have seen,[1] can only act in conformity with the law of the state or sovereignty by which they are created. It must follow, by parity of reason, that such corporations are responsible, as carriers, only to the extent and in conformity to the law of the state or jurisdiction where the contract is made or the duty undertaken. And it will make no difference whether the action is in form *ex contractu* or *ex delicto*.

2. This is in conformity to the general rule of law upon the subject of contracts and torts. Thus, in a very recent English case[2] in the Exchequer Chamber, where the subject is considerably discussed with reference to torts committed abroad, it was held, that an action will lie in the common-law courts of the realm, in respect of an assault or other tort committed by one English subject against another English subject beyond the realm, provided that the foreign law prevailing on the spot gave compensation or damages for the offence to the party injured.

3. So that, most unquestionably, where railway corporations are sued out of the jurisdiction by which they were created, and under whose laws alone they can act, the extent and degree of their responsibility must be determined by the law of the place of the existence and action of such corporation.

4. And on a contract made in a foreign country with carriers to transport goods to this country, and alleged breach of duty by negligence in causing an injury to them in that country, no ques-

[1] *Ante*, § 17 *a*.

[2] Lord Seymour *v.* Scott, 9 Jur. (N. S.) 522; s. c. 1 H. & C. 219; 8 Jur. (N. S.) 568.

tion of the *lex loci* being raised, upon the express contract and evidence of the course of business there, and other facts in the case, it was left to the jury to form a judgment whether there had been such negligence as to cause a breach of duty, and what would be reasonable under the circumstances.[3]

5. So too where the contract of affreightment does not provide otherwise, it has been held, that in respect of sea damage and its incidents, including liabilities on a bottomry bond, the law of the country to which the ship belongs must govern.[4]

6. And where a collision between American vessels occurred in a British port, the rights of the parties depend upon the British statutes or laws there in force, and if doubts exist as to their true construction, our courts will adopt that which is sanctioned by the courts of Great Britain.[5]

[3] Cohen *v.* Gaudet, 3 F. & F. 455. And in this case, where there was an express contract to send goods into England, the jury were told that meant in a reasonable time, and that the default of carriers by sea employed by them to carry the goods would be no excuse for a delay to ship them in a reasonable time, or for damage done on the quay or on the passage, which might have been avoided by reasonable despatch.

[4] Lloyd *v.* Guiburt, Law Rep. 1 Q. B. 115.

[5] Smith *v.* Condry, 1 How. (U. S.) 28.

CHAPTER XXVIII.

TELEGRAPH COMPANIES.

Their Rights, Duties, and Responsibilities.

1. *The ordinary corporate rights and duties of these companies discussed elsewhere.*
2. *The chief inquiry, as to third parties, is, which shall assume the risk of transmitting a message.*
3. *Telegraphic communications must be proved by production of the original, or in default of that, by copy, &c.*
4. *Questions will arise whether the message delivered to the operator, or that received, is the original.*
5. *If the party sending the message is the actor, that received at the end of the line is the original.*
6. *But a mere reply, or message sent on behalf of the person to whom sent, is the original when delivered to the operator.*

n. 4. *Discussion of these points in a case in Vermont.*

7. *Where both parties agree to communicate by telegraph, each assumes the risk of his own message.*

n. 5 *and* 6. *Discussion of the question of making contracts by telegraphic communication.*

8. *Illustration of the question of resemblance or difference between correspondence by mail and by telegraph.*
9. *If one employ a special operator, he assumes the risk of transmission. It is his own act by his agent.*
10. *Both parties may be entitled to maintain actions for default in transmitting messages.*
11. *Notice that company will not be responsible for mistakes in unrepeated messages binding.*
12. *The American courts adopt the same view. Company always responsible for ordinary neglect.*
13. *Companies can only be regarded as insurers of the accuracy of repeated messages.*
14. *Held responsible in one case where specially cautioned.*
15. *But, generally, not responsible for errors in unrepeated messages, except on proof of negligence or want of skill.*
16. *Telegraph companies not responsible as common carriers, and may limit responsibility to their own lines and to repeated messages, if not guilty of negligence.*

n. 10. *Discussion of the question, how far telegraph companies are common carriers.*

17. *Case in Kentucky, holding the company responsible only for care and skill in unrepeated messages.*

18, *and* n. 16. *Discussion of the question of responsibility for messages passing over different lines.*

19. *Statement of some suggested difficulties in establishing a proper rule of damages in such cases.*
20. *All that is required to render the business safe is to understand the messages correctly.*
21. *The ordinary rule of damages appli-*

cable to contracts should be applied here.

22. *The fact that such correspondence is not fully understood by the companies will make no essential difference in the application of the rule.*

23, *and* n. 21. *Party on discovering mistake must elect whether to adopt it or not.*

24. *Rule of damages adopted in some unreported cases.*

25, *and* n. 23. *The party entitled to recover penalty is the contracting party.*

26. *The duty to serve all without discrimination or preference. Disclosing secrets of office.*

27. *Several miscellaneous points decided by the cases.*

1. *Placing poles in the highway, without legislative authority, creates a nuisance.*

2. *And telegraph companies, having legislative powers, must see that their works do not obstruct the highway, to the injury of ordinary travellers.*

3. *Shipmasters are bound to know of the existence and situation of submarine cables, and not to injure them.*

4. *The duty of secrecy in regard to telegraphic correspondence important and difficult to secure.*

5. *How far treasury notes are lawful tender for rent of telegraph line, agreed to be paid in United States currency.*

6. *Telegraph posts, once legally established in the highway, cannot afterwards be removed or treated as a public nuisance.*

7. *Atmospheric influences, or unintelligible nature of message, how affecting damages.*

8. *Liberal constructions in proving telegraphic communications.*

9. *Morse's patent vindicated.*

28. *An elaborate review of numerous points of law upon the subject.*

29. *Powers of courts of equity in vindicating the exclusive rights of such companies.*

30. *Duty of companies to transmit messages promptly and fairly.*

31. *Numerous points decided in another case.*

THE importance of telegraph companies to the business interests of the country seems to require that the profession should be able to find ready access to the decided cases bearing upon those interests, whether having reference to those of the companies or of the public. And the intimate connection between the railways and telegraphs, as well as the similarity of the changes wrought in business operations by each, seem to justify the expectation that the law applicable to both should be combined in the same treatise. These considerations have induced us to here insert the leading propositions hitherto declared in the courts, both in England and America, bearing exclusively upon the rights, interests, and duties of telegraph companies.

§ 204 *c*. 1. We have before considered most of the questions bearing upon the rights and duties of telegraph companies, as corporations, requiring to take land compulsorily for their construction, since these questions do not differ materially from those which arise in the construction of railways.[1]

[1] *Ante*, §§ 1–123. But at the time of the publication of the former editions of this work telegraph companies were only in the state of early infancy, and the

2. The questions in regard to telegraph companies which have an exclusive bearing in that direction must naturally be expected to have chief reference to their duty in accurately transmitting messages; the mode of proof, and which party, as between third persons, takes the risk of any want of accuracy in such communications. These points are somewhat considered in a case in Vermont, decided at a comparatively early day, before much had been settled by the courts in regard to them.[2]

3. It is here declared, that where a telegraphic communication is relied upon to establish a contract, it must be proved as other writings are, by the production of the original. If that is lost it may be proved by a copy, or, in default of that being obtainable, by oral testimony. But it has been held, that where the principal portion of the contract is settled by oral communication between the parties, and the telegraph is resorted to for the purpose of settling some incidental matters connected therewith, the contract will be susceptible of proof by oral evidence, and the telegram is to be received as proof of the particulars settled thereby.[3]

4. Questions may arise in regard to what is to be regarded as the original, in communications transmitted by telegraph; whether the written message delivered to the operator, at the office from which sent, or the copy of the despatch delivered by the office at which it was ultimately received.

5. This will depend upon which party takes the risk of transmission; in other words, whose agent the telegraph becomes in the transmission. Where the party sending the message is the responsible party, acting on his own behalf, or on behalf of a prin-

courts had decided very little upon points having exclusive reference to those companies, either in regard to their internal or external interests. The extension of the lines to every part of the world, and the large amount of business transacted, more or less by means of such communication, will, at no distant period, render this one of the leading commercial interests, and may engross a large portion of ordinary correspondence, thus compelling the national government to assume its exclusive control as a postal agency.

[2] Durkee *v.* Vermont Central Railw., 29 Vt. 127. See also Matteson *v.* Roberts, 25 Ill. 591, where it is held that a copy of a telegram is not evidence, the original should be produced or its absence accounted for.

[3] Beach *v.* Raritan & Delaware Bay Railw., 37 N. Y. 457. There is a somewhat remarkable decision in Williams *v.* Birkett, 37 Miss. 682, that the person to whom a telegram is directed is not competent to prove its contents, without accounting for its loss and proof that the author sent it, but the admission of the alleged writer that he did send it and of its contents, is competent.

cipal, who desires to send the message to give information which he desires to have acted upon, or to obtain a reply, with a view to initiate a contract, the message delivered at the end of the line is the original.

6. A mere reply, without new conditions, or a message which the party to whom it is sent desires to have sent and consequently takes the risk of transmission, becomes the original when delivered to the operator, and cannot strictly be proved except by itself. But where the papers on which the original messages are written and delivered are not preserved, after being entered in the books of the company, the first copy made becomes the best proof of the original. Our own view will be best presented in the language used in delivering the opinion in the case[2] last cited.[4]

7. In a recent case in New York[5] it is held, that where the

[4] "In regard to the proof offered to establish telegraphic communication, it seems to us that where such communications are relied upon to establish contracts, where their force and effect will depend upon the terms used, they must be proved in the same manner as other writings, such as letters and contracts, are. For a telegraphic communication is ordinarily in writing in the vernacular, at both ends of the line, and must of necessity be so at the last end, unless the person to whom it is addressed is in the office at the time, which is sometimes the fact. In such case, if the communication were never reduced to writing, it could only be proved, like other matters resting in parol, by the recollection of witnesses in whose hearing it was repeated. In regard to the particular end of the line where inquiry is first to be made for the original, it depends upon which party is responsible for the transmission across the line, or in other words, whose agent the telegraph is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case inquiry should first be made for the very despatch delivered to the party addressed. In default of that, its contents may be shown by the next best proof.

"If the course of business is to preserve copies of all messages received in books kept for that purpose, a copy might readily be obtained which would ordinarily be regarded as better proof than the mere recollection of a witness. And according to the early English and the American practice, the party is bound to produce a copy of the original (that being lost) when in his power, and if he have a sufficient time before the trial to enable him to do so. 1 Greenleaf Ev., § 84, and note. And perhaps if no copy of such message is preserved, but the original message ordered to be sent is preserved, that should be produced, although this was not strictly the original in the case, the letter delivered, which was the original, being lost.

"But where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original, and that is to be produced, or the nearest approach to it by way of copy or otherwise."

[5] Trevor *v.* Wood, 41 Barb. 255; s. c. reversed 36 N. Y. 307. The rule in

parties have agreed that the communications between them shall be by telegraph, this in effect is a warranty by each party that his communications to the other shall be received; and a communication by telegraph is only initiated when it is delivered to the operator: it is completed when it comes to the party for whom it is designed.

8. It is here said, that the rules of law applied to contracts made by correspondence by mail are not applicable to communications by telegraph. But it seems to us that the same rules will in the main apply. For in both cases the party taking the risk of transmission will be the same, and the consequences of mistake or failure will ordinarily fall upon the same party in both modes of communication. But this case seems to hold that there is a distinction between the two modes of communication, in that the post-office, being a public institution, is not the agent of either party, but is alone responsible for the transmission of letters, while the telegraph is the agent of the party employing it. But we do not

regard to contracts by correspondence through the mail is well settled. Where one makes an offer and requires a reply by mail, the contract is closed the moment the reply is mailed, or deposited in the authorized place of deposit for letters in the post-office or elsewhere for the mail. Vassar *v.* Camp, 1 Kernan, 441; Tayloe *v.* Merchants' Ins. Co., 9 How. 390. But these and all similar cases go upon the ground that the person making the offer, directs, by implication, that the reply to his proposition shall be made through the mail, and that when it is so accepted the contract shall be considered as closed. That is said almost in terms in Tayloe *v.* Merchants' Ins. Co., *supra*, and clearly implied in the terms of the offer in Vassar *v.* Camp, *supra*. And in the latter case it is declared by the court, that the party making the offer may make it a condition that the proposed contract shall not be obligatory upon him until he receives notice of its acceptance, or unless he receives such notice in a specified time. But where nothing is said, it is the fair implication that one making an offer through the mail expects a reply in the same way; and unless he annexes some express condition to his offer, he must, as a reasonable man, expect to be bound by it, if accepted in the mode indicated by the terms of the offer. Unless this rule of construction were adopted, it would become impossible ever to have a contract closed, as both parties, at all times having the *locus penitentiæ*, might exercise it upon the receipt of the reply, or before.

And we think in all reason that one who sends an offer by telegraph, asking a reply, is bound, the moment the reply is delivered, to the company to be sent by the same communication by which the offer is transmitted. One who sends a proposition by telegraph, and asks a reply, must, in all reason and fairness, expect it will be understood, a reply by telegraph; and if so, it is difficult to perceive any difference between correspondence by mail and by telegraph in effecting a contract.

comprehend the existence of any such distinction. Both are the agents of the party employing them, and such party is responsible for the safe transmission of messages by either. This is well illustrated by the transmission of money by mail. If the debtor assumes to send the amount of his debt by mail, without instructions from his creditor to do so, he assumes the risk of safe delivery, and consequently makes the post-office his agent throughout the transit. But if the creditor directs the money sent by mail, it becomes his agent for the purpose, and the risk is his, and the debt paid the moment the money is placed in the post-office, whether it ever reaches the creditor or not.[6]

9. Where one employs a special agent, who is not the regular operator, to transmit a message across the wires, he takes the

[6] The case of Trevor *v*. Wood, *supra*, was reversed by the Court of Appeals, 36 N. Y. 307, and the following propositions declared: —

There must be a concurrence of the minds of the parties upon a distinct proposition manifested by an overt act. The sending a letter announcing consent to the proposition is a sufficient manifestation of concurrence to consummate the contract. Where the offer is by letter or by telegram, the acceptance signified in the same manner is sufficient, irrespective of the time when it comes to the proposing party.

An agreement to communicate by telegraph creates no warranty by either party that the telegrams shall be duly received.

Proof of the sending a telegram, and of sending by mail a letter accepting the proposition of the defendants, is a sufficient subscription to take the case out of the statute of frauds.

The question, at what particular point a contract by correspondence becomes fixed and irrevocable, is learnedly discussed by *Marcy*, J., in the New York Court of Errors, in Mactier *v*. Frith, 6 Wendell, 103, and the proposition declared, that where one sends an offer by mail (and the rule is the same, in correspondence by telegraph), and the other party mails a letter, in conformity with the offer accepting the same, the contract is perfected and irrevocable, from the time of mailing the letter. And this is now, we think the settled law upon the point. The Chancellor, in the same case, in the Court of Chancery, held, that the contract was not perfected until the acceptance of the offer was made known to the party making it. But the decree was reversed by the Court of Errors, and the leading opinion delivered by Mr. Justice *Marcy*, reviewing all the learning upon the question, from the Roman civil law, through the continental law-writers and the common law of England, to the present day. The later case of Brisban *v*. Boyd, 4 Paige, 17, adopts the same view, in conformity with the doctrine laid down in the Court of Errors. And the case of Trevor *v*. Wood, *supra*, in the Court of Appeals, decides that the same rule applies to contracts consummated by correspondence, by telegraph. See also Prosser *v*. Henderson, 20 Up. Canada Rep. (Q. B.) 438.

responsibility of correct transmission, whether such would have been the case or not, if he had employed the usual agencies of telegraphic communication.[7] And where such message had reference to responsibility for the act of another, the sender will be bound to the extent of what his agent transmits, whether he so intended or not. And a message so sent will be the same as if sent by himself, and will be regarded as a memorandum in writing, under the statute of frauds, to the extent of the words sent.

10. The general question of the party assuming the responsibility of the transmission of messages by telegraph is illustrated by some of the cases incidentally, in allowing the party to whom the message is sent to maintain an action for damages, on the ground that he had been misled and had thereby suffered loss, where it might have been claimed, that if the party sending the message were bound by it, in the form in which it reached the person to whom it was addressed, he would have been benefited rather than damnified, inasmuch as he would by the error have secured a much larger sale than he would otherwise have done.[8] But we think the true distinction, in regard to the party entitled to bring the action, where any default in transmitting a message by a telegraph company arises, must rest upon the distinction which everywhere obtains in actions on the case. 1. That the contracting party may maintain the action against the company on the ground of breach of contract, as well as for any breach of duty, as public servants. 2. Those who are injured by their neglect of duty, as public servants offering to serve faithfully all who may have any interest or connection with their operations, may have an action on the ground of a virtual tort in failing to perform this general duty of faithful and careful servants. This seems to us to be well illustrated by the case last cited. The sender of the message might have maintained an action to recover all the damage he sustained by an over order being sent to his correspondent. On the other hand the correspondent was not

[7] Dunning *v.* Roberts, 35 Barb. 463.

[8] New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Penn. St. 298. In this case the message was for two hand bouquets; the operator not reading the word "hand" correctly, but calling it "hund," added "red," making the order for "two hundred bouquets." The florist procured a large quantity of expensive flowers, which the party giving the order refused to accept, and he brought his action against the telegraph company for the damage, and it was sustained.

obliged to forward the two hundred bouquets and collect pay for them of the man who never intended to order them. He was not obliged to accept such man as his debtor, but might recover all his damages, if he so elected, of the party whose default and negligence caused them.

11. We must state briefly the points which have been decided in other cases. It was early decided, that where the party sending a message signs a paper handed him by the company at the time, upon which is written or printed a notice that messages of consequence ought to be repeated from the station to which they are addressed, and that a higher rate is charged for repeated messages, and that the company will not be responsible for mistakes in unrepeated messages; he will be bound by the notice, the limitation being regarded as reasonable, and if not, it is at least such a limitation as the defendants may properly annex to all their undertakings.[9]

12. A similar condition is contained in most of the bills upon which messages are required to be written by those desiring to send them by American telegraph companies. And so far as we know, the courts have in this country followed the English decision already referred to. In the last case cited a query is made how far the company in such case will be responsible for gross neglect. We think there ought to be no doubt in regard to the responsibility of the company in such cases for even ordinary neglect. And the whole extent to which such a condition should be held to qualify the responsibility of the company, is that it will not be held absolutely responsible, as insurer of the accuracy of transmitting messages, unless repeated and paid for as such.

13. This is the only ground upon which such a company could be held responsible as insurers, as this is the only mode in which perfect certainty of accuracy can be secured. And if the sender desires to secure perfect accuracy, he should so state, and pay accordingly, as it seems to us. This construction will reconcile the cases and the conflicting *dicta* in regard to the proposition how far telegraph companies are to be regarded as common carriers.[10]

[9] M'Andrew *v.* Electric Telegraph Co., 33 Eng. L. & Eq. 180; s. c. 17 C. B. 3.

[10] Thus in the case cited in n. 9 the company are spoken of by *Jervis*, Ch. J., as "carriers," and therefore entitled to annex any reasonable condition to their responsibility as insurers. And in Parks *v.* Alta California Telegraph Co., 13

14. In a recent case in Pennsylvania,[11] where the plaintiff in error was employed by the defendant in error to send a message to

Cal. 422, it is expressly decided that telegraph companies are common carriers. While in Birney *v.* New York & Washington Tel. Co., 18 Md. 341, the company is held responsible for all reasonable diligence to transmit the message correctly, but is not regarded as a common carrier, but performing a service for others according to its established rules, and that such rules bind him, if known to the employer, or if he has the means of knowing them they form part of the contract and undertaking of the company. But it is here held, that the exception as to the company's responsibility for unrepeated messages will not excuse the company, where the operator forgot the message and made no effort to transmit it.

And in N. Y. & Washington Printing Tel. Co. *v.* Dryburg, 35 Penn. St. 298, it is also declared, that telegraph companies are not responsible as common carriers and insurers of the correct transmission of their messages, but their responsibility is similar to that of common carriers, and if they negligently or wilfully violate their duty of sending the very message ordered to be sent, they are responsible in damages to the party injured. The corporation, it is here said, is liable in *tort* for the misconduct of its agent, although not appointed under the seal of the corporation, if the act be done in the ordinary course of his service or duty. And even when the sender did not pay for repeating the message according to the standing rules of the company duly published, this will afford no excuse for the company where the operator added to the message left an important matter, making it read differently, and, in fact, to be an entirely different message.

These cases, and some others might perhaps be quoted of the same character, sufficiently evince the animus of the rule of law upon the point of the responsibility of telegraph companies.

1. If they annex no conditions to their undertaking, they will be expected to do it in the same careful and faithful manner that other careful and skilful men in that department do such business.

2. If a message is left and paid for as a single transmission, the sender, or those interested in the sending, will be expected to assume what risk necessarily attends such transmissions after diligent and faithful effort to accomplish the duty.

3. As there is but one sure test of the accuracy of messages being sent, that is, by repeating them, one who desires to secure that, or where the business is of such importance as to make that desirable and reasonable, will be expected to so inform the company and pay for the insurance.

4. This rule is so obviously just and reasonable, that we believe it forms a standing and undeviating rule of all the telegraph companies here and elsewhere, and is so notorious, that all persons sending messages may fairly be presumed aware of its existence and will be bound by it.

There are some few early cases not falling precisely within these rules perhaps, but they are not of much weight. In the Court of Common Pleas, Ohio, in the case of Brown *v.* Lake Erie Telegraph Co., 1 Am. Law Reg. 685, it was de-

[11] U. S. Telegraph Co. *v.* Wenger, 55 Penn. St. 262.

New York for the purchase of stocks, the message being prepaid, and the operator informed at the time that the company would be held responsible for any failure in the transmission, it was held that having failed to transmit the message, they were responsible for the amount lost by the advance in the price before the actual purchase, made upon a later message. In a case of this kind, there would have been the fullest justification, on the part of the company, in requiring pay for repeating the message, as the only means of insuring certainty.

15. In a recent case in Massachusetts,[12] it was held that telegraph companies might limit the measure of their responsibility for errors in the transmission of messages, by reasonable rules and regulations brought home to the knowledge of the other party. And where the blank upon which the message is written contains, as part of the terms upon which messages are received for transmission, a statement, that every important message should be repeated (at half the price of the original charge), in order to secure certainty of accuracy, and that the company would not be responsible for any error in the transmission of an unrepeated message, beyond the price paid for its transmission, unless a special agreement for insuring the same be made in writing, and an error occurs in transmitting the message, which is also delivered upon a similar blank, and there is no request to have it

cided at a jury trial, that telegraph companies are responsible for all mistakes or errors in the transmission of messages by them unless from causes beyond their control. This is treating their responsibility as precisely of the same character as that of common carriers, which makes them insurers of the faithful transmission of their messages. If that were so it would justify their taking the only course sure to result in absolute certainty, and repeating every message, and charging accordingly. It seems to us the telegraph companies might, by reversing their rule in regard to repeating messages, secure complete indemnity to themselves, against claims for damages, when their agents conduct with entire fidelity. Thus by repeating every message and charging for the double transmission, unless otherwise ordered, they would know whether the risk of transmission was with them or their employers. And if the message was repeated, at the very moment of transmission, it would by no means cause the same increase of labor or time as the transmission of a distinct message.

The repeating a message does not secure one from errors in reading the original order for the message. But the sender may, by slight extra pains, insure the correct reading of his message, by requiring the operator to read it aloud to him at the time of delivery.

[12] Ellis *v.* American Tel. Co., 13 Allen, 226.

repeated, the company are not responsible beyond the amount paid for transmission.

16. It seems to be almost universally recognized by the courts, that telegraph companies are not responsible as common carriers, but only according to the nature of their undertaking and the character of the business, and that they may establish any reasonable rules and regulations limiting their responsibility, to their own lines, and to repeated messages,[13] subject only to the reasonable qualification that no such rules or regulations shall have the effect to screen the company from the consequences of their own default or misconduct.[14]

17. The rule of responsibility of telegraph companies seems to be as correctly laid down in a late case in Kentucky as in any other.[15] It was here held, that one who sends a message under the

[13] Western Union Tel. Co. *v.* Carew, 15 Mich. 525. This was an action by the defendant in error to recover damages for the incorrect transmission of a message from Detroit to Baltimore over the plaintiffs' lines. It appeared that the message was written on a blank furnished by the company, on which was printed a notice calling attention to certain regulations established by them, printed on the back, and requesting them to send the message subject thereto, containing these, among others: that the company would not be responsible for errors or delay in the transmission of unrepeated messages; that an additional charge would be made for repeating messages; and that it would assume no responsibility for errors or delay on the part of any other company over whose lines the message might be sent. The plaintiffs' lines extended only to Philadelphia, to which place the message was correctly sent. It also appeared that the defendant had never read these regulations, had never had his attention called to them, and did not in fact know that the message would pass over any other lines on its way to Baltimore. *Held*, that telegraph companies, in the absence of any statute provisions, were not common carriers, and that their liabilities and responsibilities were not to be measured by the same rules, but must be fixed by considerations growing out of the nature of the business in which they are engaged; and that they do not become insurers against errors in the transmission of messages, except so far as, by their rules and regulations or by contract, they choose to assume that position; that in such a case as this the printed blank was a general proposition to all persons of the terms and conditions upon which messages would be sent; and that by writing the message and delivering it to the company the defendant in error accepted the terms and conditions; and that they were reasonable.

[14] Mann *v.* Western Union Telegraph Co., 37 Mo. 472.

[15] Camp *v.* Western Union Tel. Co., 1 Met. (Ky.) 164. This case is supported by many of the cases before referred to, and by some others more or less directly. Thus in New York, Albany, & Buffalo Tel. Co. *v.* De Rutte, N. Y. Com. Pleas, 5 Am. Law Reg. (N. S.) 407, s. c. 1 Daley, C. P. 547, the same rule is laid down with the qualification, that knowledge of this limitation of

knowledge of the ordinary notice, limiting the responsibility of the company for unrepeated messages, as already stated, is pre-

responsibility by the company must be brought home to the sender. But this knowledge will be presumed in many cases, as, where the sender signs a bill containing such notice, he will be presumed to have knowledge of its contents, as that was within his power, and becomes consequently his duty. So also where such a condition from its innate fitness may be presumed to suggest itself to all persons as the only ground upon which such companies could safely undertake for the perfect accuracy of the transmission of messages, or by which it could be secured by any one, it will be the duty of the sender, and equally of the receiver, to see that his message is or has been repeated, or else to understand that he assumes the necessary hazard in regard to possible inaccuracies in all unrepeated messages. And where such a practice becomes universal in the business of telegraphing, its notoriety will affect all with presumptive notice, since all men who allow themselves to have any thing to do with any general business are bound to inform themselves in regard to those rules affecting the transaction of the business, which, by common consent of all connected with it, are of such reasonableness and necessity as to have become of universal acceptance. And as all persons any way connected with any business are bound to understand its universal or elementary principles, so they will be presumed to do so. This rule of construction is of such universal application, that, in the construction of written contracts, it is always assumed that both parties understand these universal and elementary laws of the business forming the groundwork or subject-matter of the contract, and that they intend to contract with reference to these laws and in subordination to them, unless where the express terms of the contract are in irreconcilable conflict with these laws. In such cases only can it fairly be assumed by courts that the parties intended to contract, in disregard and in defiance of the universal laws of the business.

These principles are somewhat considered, and, as we think, substantially confirmed by the following well-considered case: —

A telegraph company furnished to the public printed blanks upon which persons wishing to send messages were to write the same. These blanks contained a printed heading, in which the company stated the conditions upon which it would transmit messages; provided a method was adopted of guarding against errors or delays in the transmission or delivery of messages, by a repetition thereof; and declared that it was agreed by the company and the signer, that without such repetition the liability of the company for such error or delay should be limited to the amount paid for the transmission, unless the message was specially *insured*. After the blank date, and before the space for the message, were these words: "Send the following message subject to the above conditions and agreement." *Held*, that such a printed blank before being filled up was a general proposition to the public of the terms and conditions upon which messages would be sent, and the company become liable in case of error or accident.

That by writing a message under such a heading and signing and delivering it for transmission, the sender accepted the proposition, and it became an agreement binding upon the company only according to its specified terms and conditions.

And that the legal consequence was not varied by the fact that the sender of

sumed to assent to its binding obligation, as it is both reasonable and just, and such as the company had the right to prescribe as the price and measure of its responsibility, and that a party acting under it, who does not have his message repeated, will be regarded as sending the same at his own risk, and the company will not be liable for damages resulting from a mistake not occasioned by negligence or want of skill in the agents of the company.

18. In the case of the New York, Albany, and Buffalo Telegraph Company *v.* De Rutte,[15] it was decided, in regard to messages going beyond the line of the first company, that where the first company takes the compensation for the entire distance, it thereby engages for the due delivery of the message at its destination, unless it expressly limits its responsibility to its own route, or the circumstances are such as clearly to indicate that such was the understanding of the parties. It is here said the telegraph company are not strictly common carriers, but their responsibility is analogous and to be measured by the application of analogous principles, but not always to the same extent. We see no reason why the responsibility of the first company for the entire route may not fairly be measured by the same analogies as that of common carriers of passengers, which will be found sufficiently discussed in another place. There is a well-considered case in Upper Canada bearing upon this point, decided by a divided court, but it

the message had not read the printed conditions and agreement there subscribed. That such an omission would be gross negligence, which he would not be allowed to set up to establish a liability against the company which was expressly stipulated against.

Against such a claim the principle of estoppel *in pais* applies in full force.

Telegraph companies are not common carriers. The two kinds of business have but a mere fanciful resemblance, and cannot be subjected to the same legal rules and liabilities. But even if they were common carriers, their right to limit their liability by express contract is well settled.

The plaintiffs delivered to the defendant, for transmission from Palmyra to their correspondents in New York, a message directing the purchase of "$700 in gold," written under such printed blank as above described, and signed by them without ordering the message to be repeated or providing for its being insured. Through the error of some of the defendants' operators the message, as delivered to the correspondents, required them to purchase $7,000 instead of the smaller sum; in consequence of which error the plaintiffs suffered serious loss. *Held*, that they could not recover the amount of the company. Breese *v.* United States Tel. Co., 45 Barb. 274.

would seem that the opinion of the majority of the court followed the analogies applicable to passenger carriers more closely than that of the dissenting judge.[16]

19. There has been considerable discussion in the courts in regard to the proper rule of damages, in case of the default of telegraph companies in sending messages correctly. It has been claimed, that, by reason of the ignorance of the company, in most instances, of the importance of messages sent along their line, there is no properly defined rule of damages, and no measure of the diligence or responsibility of the company, and no standard by which they could properly measure their charges so as to include the proper premium for insurance.[17]

[16] Defendants owned a telegraph extending to Buffalo only, but in their printed handbills they advertised their line as "connecting with all the principal cities and towns in Canada and the United States;" and they received the charge for transmission to places beyond their line. The plaintiff had some flour in the hands of N., his agent at New York, and about 3 P. M., on the 23d November, delivered to the defendants, at Hamilton, the following message addressed to N., paying the charge to New York: "Am disposed to realize — sell 1,500 barrels." At the time of delivering the message, nothing was said as to its importance, or the necessity for immediate despatch, and, owing to the defendants' line being out of order, it was not sent till after five on the following afternoon, — being Saturday. The defendants' operator received it at Buffalo, and on the same day delivered it at the office of the American Company, paying their charge. It was not received by the plaintiff's agent in New York until after business hours, on the 26th, and in the mean time the price of flour had fallen materially. The agent, therefore, did not sell, but held the flour until the end of December, and as the market had continued to fall, it then realized nearly $5 a barrel less than could have been obtained on the 23d or 24th. In an action against defendants for negligence in transmitting and delivering the message at New York, the jury found for defendants, and on motion for a new trial, Held, —

That the verdict must stand, for the only negligence shown was in delivering the message at New York, and if defendants were liable for that, they would not be answerable for loss caused by a fall in the market, but under the evidence for nominal damages only.

Per *Robinson*, C. J., and *McLean*, J. — "Defendants, under the facts proved, could not be held liable for delay beyond their own line, but were bound only to transmit the message to Buffalo, and hand it to the American Company there, paying the charge to New York."

Per *Burns*, J. — "That the defendants were liable as upon an undertaking to transmit the message to New York, and deliver it there." Stevenson *v.* The Montreal Tel. Co., 16 Upper Canada, 530.

[17] Opinion of *Jervis*, C. J., in McAndrew *v.* The Electric Tel. Co., 33 Eng. L. & Eq. 180, 185; s. c. 17 C. B. 3.

20. But we do not apprehend there will really be any difficulty in such companies securing themselves against all reasonable hazard, by the use of suitable caution in assuring themselves at the time of receiving a message that they understand the correct reading of it. For after that it is always in their power to know with absolute certainty whether it is correctly transmitted, by having it repeated back. And as we have before said, if the sender do not choose to be at this expense he will then assume all risk of the transmission, so that in either case all the company really require to render their business entirely safe, is, to be sure they understand the message left with them, which is not attended with any necessary uncertainty.

21. The rule of damages then will be a plain one. The company must make good the loss resulting directly from any default on their part. We see no reason why the ordinary rule should not be applied to cases of this character, as that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach.[18] It is here said, that it is only uncertain and contingent profits which the law excludes, and not such as, being the immediate and necessary result of the breach of contract, may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to established market rates. This same rule of damages has been applied, in the State of New York, to cases of failure to send messages by telegraph companies according to their duty and undertaking.[19]

22. We do not apprehend there is any valid objection to the application of this rule of damages to the case of telegraph companies on the ground of the secrecy and reserve with which such correspondence is commonly conducted, and that consequently the companies have not in most cases any sufficient data to form any just appreciation of the extent of the responsibility. The rule is not based so much upon what is supposed to have been the actual expectation of the parties, as what it ought to have been under the circumstances, if their minds had been drawn towards the contingency of a failure in performance. And if one or both the

[18] Griffin *v.* Colver, 16 N. Y. 489.

[19] Landsberger *v.* Magnetic Tel. Co., 32 Barb. 530.

parties choose to enter into the contract, in such ignorance of the facts as not to have been capable at the time of estimating the real extent of the responsibility assumed, that can be no sufficient ground to exonerate him from the full extent of responsibility attaching to the contract. The rule of responsibility is the same for all who freely enter into the same contract, whether fully or correctly informed of the extent of the obligation or not, provided they are not misled by the opposite party.

23. There is one point decided in a somewhat early case [20] upon this subject, which seems to us exceedingly reasonable; that if, when the party sending a message for the purchase of goods, learns that by mistake the amount ordered has been enlarged in the transmission of the message, and in consequence his agent has purchased many times more than he directed, he still retains the whole amount purchased, he cannot recover any loss which accrues beyond what would have been experienced upon an immediate sale; and if he sends the commodity to another market for purposes of speculation, with the intention of taking to himself the profits, if any should arise, and in the event of loss visiting it upon the company, he cannot recover for any loss sustained. For, by adopting the purchase in that mode, he makes the act of the company in transmitting the message enlarged, his own, and he cannot accept the excess purchased both for himself and the company at the same time. He must elect at the time, whether to regard the excess of the order as purchased for himself or the company, and dispose of it accordingly. The points decided in the last case cited will repay repeating here, as they have a very sensible bearing upon questions of damage arising in this class of actions.[21]

[20] Washington & New Orleans Tel. Co. *v.* Hobson, 15 Gratt. 122.

[21] In an action against a telegraph company for damages sustained by the plaintiffs by the alteration of a message sent on their line, whereby an order to the plaintiffs' factors in Mobile to buy 500 bales of cotton was altered to 2,500, but not charging negligence in the company, an instruction that the defendants are not responsible as common carriers, but only as general agents, for such gross negligence as in law amounts to fraud, is not authorized by the pleadings, and properly refused.

In such case the factors having bought 2078 bales of cotton before the mistake in the message was ascertained, if the company is liable to the plaintiffs for the damages resulting from the alteration of the message, the commissions of the factors upon the purchase of the cotton are a part of the damages for which the com-

24. There are some manuscript cases bearing upon the question of damages in actions against telegraph companies for default in transmitting messages, which it may be well to state.[22] In the

pany is liable, and the plaintiffs are not bound to accept any offer of the company to pay the damages which excludes these commissions.

In such case if the company is liable to the plaintiffs for damages arising from the alteration of the message, the measure of these damages is what was lost on the sale at Mobile of the excess of the cotton above that ordered, or, if not sold there, what would have been the loss on the sale of the cotton at Mobile in the condition and circumstances in which it was when the mistake was ascertained; including in such loss all the proper costs and charges thereon.

When the mistake was ascertained, a part of the cotton was on board a ship to be sent to Liverpool: a part was under a contract of affreightment to the same place, but not on board. The whole should have been sold as it was at Mobile: the plaintiffs having sent it to Liverpool and sold it there, the loss to the company must not be increased by this act of the plaintiffs, but must be based upon an estimate of what it would have sold for, a part on shipboard and a part under contract of affreightment.

If the plaintiffs sent the cotton to Liverpool for purpose of speculation, with the intention of taking to themselves the profits, if there were any, and in the event of a loss, visiting the loss upon the company, they are not entitled to recover for any loss sustained upon it.

But if the plaintiffs sent the cotton to Liverpool, not with the purpose of taking the profits, if any, but only to indemnify themselves out of the proceeds to the extent of the cost and the obligations incurred by them, they do not thereby lose their right to recover from the company the damages which they would have sustained if the cotton had been sold at Mobile.

The plaintiffs, if they intended to hold the company responsible for the excess of the cotton purchased, should, as soon as they were apprised of the purchase, have notified the company of such intention; should have made a tender of such excess to the company on the condition of its paying the price and all the charges incident to the purchase; and intimated also, that, in case of its refusal to accept said tender and comply with its conditions, they would proceed to sell such excess at Mobile, and after crediting said company with the net profits, would look to it for the difference between the amount of such proceeds and the cost of the excess, including all proper charges. And upon the failure of the company after notice to accede to their offer, they should have proceeded accordingly.

[22] Lockwood *v.* Independent Line of Tel. Co., New York Com. Pleas, Nov. 1865, before Judge *Daly*, a judge of learning and experience, and whose decisions always have weight when authoritatively reported.

There is a case reported in 1 Upper Canada Law Journal (N. S.), 247, as decided in the Common Pleas, New York, by the name of Rittenhouse *v.* The Independent Line of Telegraph; s. c. reported in 1 Daley C. P. 474, where it was held that a telegraph company is not excused from liability for an erroneous transmission of a message, by the fact that its meaning was unintelligible to the company, so long as the words were plain. It is also here

former of these cases it is said to have been held, that where a merchant in New York ordered a message sent, "Stop sewing pedal braid till I see you," and it was delivered, "Keep sewing," &c., and from the error a large quantity of braid was manufactured into unfashionable shape, which the merchant received and disposed of in the best manner, he was entitled to recover the whole loss sustained in consequence of the error. And the same rule was adopted in the case secondly cited above.[22]

25. Where the statute imposes a penalty for refusing to send a message across the line of the company, to be recovered by the person contracting, it was held that where one directed a message sent by one company to a point beyond their own line, and the first company, at the end of their line, tendered the message to the next company on the line for transmission, which was refused, such person was not the person contracting or offering to contract with the second company; but that the action to recover the penalty should have been in the name of the first company.[23]

reported to have been held, that, when an order is sent by telegraph for the purchase of one article, and by a blunder of the operator the despatch is made to read as an order for another, the company must make good any difference between the price paid for the article actually ordered, if purchased as soon as the error is discovered, and the price at which it could have been purchased when the despatch was received. But the company is not liable for a loss upon a resale of the article under the erroneous despatch, unless the company has had fair notice of such resale. Leonard & Burton *v.* N. Y., Albany, & Buffalo Tel. Co., Fifth Dist. Sup. Court.

[23] Thurn *v.* Alta Tel. Co., 15 Cal. 472. The case is thus stated at length: Where a telegraph company fails to transmit a message upon compliance, by the person contracting with it, with the conditions required by § 154 of the act of 1850 (370), an action for the penalty given by the act lies in favor of such person.

The sum to be recovered is a penalty for the breach of the duty to transmit the message, and the act is, in this section, a penal law, to be strictly construed.

Under the above section the person entitled to recover the penalty is the party who contracts, or offers to contract, for the transmission of the despatch. He may probably do this by his agent or servant, but when the contract is made by a party as agent of another, in order to give a right of action to the principal, the fact of agency must be shown.

Proof as follows: "I am Superintendent of the California State Telegraph Company, and operator in their office at San Francisco. July 2d, Plaintiff came to our office and delivered a message, to be transmitted to Jackson, and paid for transmitting it there. The message was, 'Alta Express Co., Jackson. If you have package for me, forward immediately. Signed, C. Thurn." In the margin of the message sent were the words 'F. July 2nd.' Few words passed

26. In England, and in many of the American States, telegraph companies are required to serve all who desire it, on such reasonable terms as shall be prescribed by the company for the regulation of their business, making no discrimination or preference in favor of or against any one. But it was held that where one contracted with a telegraph company to collect public intelligence and send it over their line exclusively, the company to pay him fifty per cent of the charge of transmission for collecting it, or, in other words, to transmit it for half price; it was held that this was no violation of the English statute, requiring companies to do business for all, "without favor or preference," it being regarded by the court as a legitimate mode of compensating the party for collecting the intelligence, and for bringing custom to the company.[24] And it has also been decided, that the statutory prohibition against disclosing the secrets of the office or communicating messages, does not extend to a disclosure as a witness in a court of justice.[25] The wonder is that any one should ever have supposed that such a disclosure could incur a penalty under the statute.

27. There are some few other points, of rather a miscellaneous character, which have been decided in regard to the rights, duties, and liabilities of telegraph companies, which we shall state very briefly. 1. We have before noticed some cases bearing upon the relative rights, pertaining to highways and telegraph companies, under the subject of Eminent Domain and Highways. It seems to be settled in England, that placing telegraph

when the message was delivered; no express agreement that the Cal. State Telegraph Company should forward the message to Sacramento, and employ the Alta California Telegraph Company to transmit it from there to Jackson. He must have known that we could not send it to Jackson, as we had no line there. I think there was something said about sending it by the defendants' line from Sacramento." C. Thurn, the plaintiff, sues the Alta Cal. Telegraph Co. for the penalty under the 154th section of the act of 1850 (370). *Held*, that under these facts he is not the person making or offering to make the contract, within the meaning of the act, and cannot recover; that the only contract proven is a contract by the State Telegraph Company to send the message or have it sent; and a contract on its part to contract on its own account with the Alta Telegraph Co., to send the message.

If the message in this case had not been transmitted, plaintiff might have held the State Telegraph Co. responsible. Thurn *v.* Alta Telegraph Co., 15 Cal. 472.

[24] Reuter *v.* Electric Tel. Co., 6 Ellis & Bl. 341.

[25] Henisler *v.* Freedman, 2 Parsons, 274.

posts in the highway without legislative authority, will be ordinarily treated as a nuisance, unless placed in some position inaccessible to ordinary travellers, even when not placed in the travelled or central portion of the highway.[26] So, also, when a telegraph company without any parliamentary powers laid down their wires in tubes under a highway, an information and bill was filed, complaining of this as a nuisance to the public, and an invasion of the rights of the adjacent land-owner. But the court refused to grant an injunction until the rights of the parties had been established at law.[27] 2. And where telegraph companies are allowed by legislative grant to lay down their lines along a highway, they are still bound to see that no injury happens to passers along the highway, from the defective or imperfect condition of the instruments used by them, whether posts or wires.[28] It was here decided, that in such cases the company will be responsible for damages to an individual, caused by the erection of the telegraph along the highway, if improperly made, or if suffered to fall down and be out of repair, although the travelled part of the way is not thereby obstructed. In this case the plaintiff was a passenger upon a stage-coach, which was upset by coming in contact with the wires of the company, in consequence of the decay and swaying over of the posts and the lowering of the wires thereby, although not across the travelled part of the highway. 3. In one case[29] the plaintiffs were the owners of a telegraph cable lying at the bottom of the sea between England and France. The defendants were aliens, and their ships, while sailing upon the high seas, more than three miles from the English coast, lowered an anchor and injured the cable. It was held that the court would presume that the masters of the ship knew of the existence and situation of submarine cables, and that a duty was thereby cast upon all masters of ships to manage their vessels so carefully and skilfully as to avoid (if possible, by the exercise of reasonable precaution) injuring these cables. 4. The extent of the duty of maintaining secrecy among the operatives and employees of the telegraph com-

[26] Reg. *v.* United Kingdom Electric Telegraph Co., 9 Cox, C. C. 174; s. c. 6 L. T. (N. S.) 378; s. c., 31 L. J. (N. S.) Magistrates Cases; *ante*, § 109.

[27] Attorney-General *v.* United Kingdom Electric Telegraph Co., 30 Beav. 287; s. c. 8 Jur. (N. S.) 583.

[28] Dickey *v.* Maine Tel. Co., 46 Me. 483; s. c. 8 Am. Law Reg. 358.

[29] Submarine Tel. Co. *v.* Dickson, 15 C. B. (N. S.) 750; s. c. 10 Jur. (N. S.) 211.

panies whose employment brings them acquainted with the contents of messages sent or received, is of great importance. This is in many of the States secured by the imposition of penalties for disclosure. But we apprehend that no security will be available in any such sense as to render this mode of communication safe and comfortable, unless it be either the religious sense of duty, or at the least a sense of moral honesty and honor, which should lead one to speak the truth and to keep the truth, when that becomes a duty.[30] There can be no question of the duty of the most inviolable secrecy in regard to all messages sent or received by telegraph companies. And unless this can be secured it will very essentially abridge the extent of their business. There is a duty in all employments to keep the secrets of the business, but more especially in one where such extensive correspondence is conducted.[31] 5. There is one decision in regard to these companies by the Supreme Court of Nova Scotia,[32] which has more bearing upon the question of currency than any other. By the terms of the lease of the plaintiffs' line to the defendants, payments are to be made for rent in "dollars and cents of United States currency." A question arose whether the treasury notes, made lawful money in the United States by subsequent act of Congress, could be regarded as coming fairly within the terms of the lease, the value of the United States currency being thereby greatly depreciated. The court held that notes were not a legal tender on the lease for rent. This decision unquestionably meets the equity and justice of the case, but whether it meets the law is, perhaps,

[30] It has been observed of late that women are more generally employed in telegraph offices than formerly, and especially on the other side of the Atlantic. This has been attributed to the higher sense of truth and honor among that sex than the other. The same thing leads many to employ women as cashiers in places where it is impossible to place any check upon them. The same reason has been assigned for employing women in highly responsible places in the Treasury department since the manufacture of so much of the currency of the country there. This is not the place to discuss questions of that character.

[31] In Tipping *v.* Clark, 2 Hare, 393, *Wigram*, Vice-Chancellor, said, that every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. See also Prof. Dwight's excellent article on the law of this subject. 4 Am. Law Reg. (N. S.) 193, 206, and cases cited on this point. We desire here to make our acknowledgments for great assistance from that article in preparing our own chapter on the topic.

[32] The Nova Scotia Tel. Co. *v.* Am. Tel. Co., 4 Am. Law. Reg. (N. S.) 365.

more questionable. We have come to regard that act as entirely within the constitutional powers of Congress, although a most awful experiment to visit upon a commercial country like our own, and one which foreign courts would look upon as altogether inadmissible under the circumstances in which it was adopted. But if its adoption was doubtful, its continuance seems more so, after the emergency which called it into existence has passed away. 6. Where a telegraph company has obtained permission to establish their posts through any town or city, by decision of the municipal authority, and such posts are thus established within the limits of the highway, this settles, conclusively, the rightfulness of their erection, so that they cannot subsequently be removed by such municipal authority, or treated as a public nuisance.[33] 7. In one case it seems to have been considered by the judge, that telegraph companies could not be held responsible beyond the amount paid, for any defect in transmitting a message, because the operation was liable to be affected by atmospheric influences; and also because the message was so expressed as to be unintelligible to the operator, and he could not be supposed to comprehend its value.[34] This latter might possibly be some excuse for not holding the company responsible for any large sum beyond the cost of the message. But it is generally expected that a message of a commercial character is of more value than its cost or it would not be sent. And we know of no other case where atmospheric influences are considered as relieving these companies from responsibility for not correctly transmitting messages. 8. The rule of admitting telegrams purporting to be in reply to those sent, on the ground that they must have been authorized by the parties whose names they bear, is naturally somewhat liberal.[35] But telegrams sent by the wife of a co-defendant are not evidence against any of

[33] Commonwealth *v.* Boston, 97 Mass. 555.

[34] Shields *v.* Western Tel. Co., 9 Western Law J. 283. See also Kinghorn *v.* Mont. Tel. Co., 18 Up. Canada (Q. B.), 60, as to special damages not being recoverable in ordinary cases of this character. In Law *v.* Montreal Tel. Co., 7 Up. Can. (C. P.) 23, where the plaintiff sent his ship to take a cargo of wheat between two points, supposing he could have 8,000 bushels by mistake of the company, instead of 3,000, the actual number, he was held entitled to recover the expense of sending his ship and returning, but not the loss by taking a freight of 3,000 instead of 8,000 bushels.

[35] Taylor *v.* Steamboat Robert Campbell, 20 Mo. 254.

the defendants.[36] 9. Morse's patent is vindicated and its infringement declared in a very elaborate case in the United States Supreme Court.[37]

28. There is one case,[38] which seems to cover a large portion of

[36] Benford *v.* Sanner, 40 Penn. St. 9.

[37] O'Reilly *v.* Morse, 15 How. (U. S.) 62.

[38] De Rutte *v.* New York Tel. Co., 1 Daley (C. P.), 547. The contract for the transmission of a telegraphic message is not necessarily made with the person by whom it is sent. If the person to whom it is addressed is the one interested in its correct and diligent transmission, and by whom the expense of sending it is borne, he will be regarded as the person with whom the contract is made.

The business of telegraph companies, like that of common carriers, is in the nature of a public employment, as they hold out to the public that they are ready and willing, upon payment of their charges, to transmit intelligence for any one, and not for particular persons only.

Common carriers are held to the responsibility of insurers for the safe delivery of property intrusted to their care, upon grounds of public policy, to prevent fraud and collusion with thieves, and because the owner, having surrendered up the possession of his property, is generally unable to show how or where the loss or injury occurred.

These reasons do not apply to telegraph companies, and they are not held to the responsibility of insurers for the correct transmission and delivery of intelligence. As the value of their service, however, consists in the message being correctly and diligently transmitted, they necessarily engage to do so, and if there is an unreasonable delay, or an error committed, it is presumed to have originated from their negligence, unless they show that it occurred from causes for which they are not answerable.

They may qualify their liability to the effect that they will not be answerable for errors unless a message is repeated, but this condition must be brought home to the knowledge of the person who brings the message for transmission.

Where a telegraph company is paid the whole compensation for the transmission of a message to a place beyond their own lines, with which they are in communication by the agency of other companies, they will be regarded as engaging that the message will be transmitted to, and delivered at that place, unless there is an express stipulation to the contrary, or the circumstances are such as to show that the understanding of the contracting parties was otherwise.

Where a merchant in San Francisco receives a telegraphic message from New York, which leads him into a purchase involving inevitable pecuniary loss, such as would not have occurred but for an error in the transmission of the message, he is not compelled to seek through an extensive chain of telegraphic communication to ascertain where the error was made, but the company to which the message was originally delivered, and to which the whole compensation for its price was paid, is liable. Having peculiar facilities, the obligation is then upon

the questions which have arisen upon this subject. The high character of the court, although one of subordinate jurisdiction,

this company to ascertain where and how the error occurred, and to fix the ultimate responsibility where it belongs.

The defendants' line of telegraph extended from New York to Buffalo, where it connected with other lines and a pony express to San Francisco. The defendants received the entire compensation for sending a message to San Francisco, which was correctly sent by their own line and the connecting lines as far as St. Louis, but an important mistake occurred between that point and San Francisco. *Held*, as nothing was said about defendants being responsible for correct transmission over their own lines, as they received the whole amount that was asked to send it to San Francisco, without communicating by what lines it would be sent, or any other particulars as to the mode or manner of its transmission, that they took upon themselves the whole charge of sending it, and were answerable for the error.

Independent of any question of contract, if a person is put to loss and damage through the negligence of a telegraph company, in transmitting to him an erroneous despatch, the company would be liable to him in an action for negligence; and if they received the whole compensation for sending it, they would be liable in such an action, though the error was made by one of the companies through whom they transmitted it.

The plaintiff's agent in Bordeaux obtained from a commercial house in that city an order for the plaintiff, a commission merchant in San Francisco, to purchase for them, and ship from San Francisco, a cargo of wheat, at a certain price. The plaintiff's agent prepared a telegram in these words: "Edward De Rutte, San Francisco. Buy for Callarden & Labourdette, bankers, a ship-load of five to six hundred tons white wheat, first quality, extreme limit 22 francs the hectolitre, landed at Bordeaux; same conditions as the Monod contract. Th. De Rutte," — which the plaintiff's agent sent in a letter to a commercial house in New York, with instructions to send it to the plaintiff at San Francisco in the quickest manner, and to charge the expense to the plaintiff. The house in New York sent it by their clerk to the defendants' office, who paid to the defendants the entire compensation for its transmission by telegraph to San Francisco. When delivered to the plaintiff in San Francisco, several errors had been made in its transmission, the most important of which was a change from 22 to 25 francs the hectolitre. The plaintiff was not misled as to the other errors, and knew what was meant; but the words "25" he assumed to be correct. Grain could be purchased at that time in San Francisco at from 24 to 25 francs the hectolitre, and he accordingly chartered a vessel and purchased a cargo. But before the vessel sailed, he received, via New York, the letter which his agent had sent, when discovering the mistake, he resold the wheat, and got rid of the charter-party, incurring by the transaction a loss of over $2,000, for which he sued the defendant and recovered.

Held, that the defendant's contract for the transmission of the message was with the house in Bordeaux, not with the house in New York, and the action was properly brought in his name.

That it was not an act of co-operating negligence for him to act upon the

and the very satisfactory manner in which the question was disposed of, seem to justify its insertion here, at length, so far as the head notes extend.

29. Where a telegraphic company is established from one point to another, having secured the exclusive right of using its mode of operation, a court of equity cannot restrain another company from dividing the business between those two points by means of transmitting messages by a circuitous route, by another mode of operating which does not infringe the patent of the first company.[39]

30. The law requires messages to be transmitted in the order in which they are received, promptly and faithfully. And where a party left a message: "Come by the night train," and paid the price of the transmission, and was assured it would be done at once, and it was delayed till the next morning, when it was of no importance, he was held entitled to recover the penalty of $100, under the Indiana statute for voluntary neglect of duty by telegraph companies, unless the delay were caused by the exception in the statute in favor of communications for and from officers of justice.[40]

31. In another case the following points were determined. A clause in the printed regulations of a telegraph company, that they will not be responsible for mistake or delay in the transmission of a message, applies only to the transmission of the message and not to mistakes or delay in its delivery after it has been correctly transmitted. The plaintiff sent a message to the defendants' office in New York, directed to an attorney in Providence, R. I., directing him to attach a house and lot in the latter city, of one B., who was then temporarily absent from Rhode Island, for a debt of $12,000 due from B.'s firm to the plaintiff. The message was brought to defendants' office at half-past eight P. M., the office

despatch, without having it repeated, after he had discovered three errors in it. That they were not of such a nature as should have led him to treat the whole despatch as unreliable, and that he was justified in assuming that the word "25" had been correctly transmitted.

That as the error in the despatch was the cause of his purchasing the wheat at the price which he did, and as the inevitable loss which occurred was the direct and immediate consequence of the error, the loss he sustained was the proper measure of damages.

[39] Western Tel. Co. *v.* The Magnetic Tel. Co., 21 How. (U. S.) 456; Same *v.* Penniman, id. 460.

[40] Western Union Tel. Co. *v.* Ward, 23 Ind. 377.

being then closed for the transaction of ordinary business. Their agent was told that the message was important; that unless it was sent and delivered at once, it would be of no use; that the object of the message was to get an attachment upon property in Providence; that unless it was made before the Stonington train reached the Rhode Island state line, it would do no good. The defendants' clerk answered the plaintiff's messenger, that the message would be sent and delivered as requested, and that he would not take the money if he thought there was any doubt about it. The message was sent at ten minutes past nine, P. M., with directions from the operator in New York to send it in haste, and was received by the operator in Providence at half-past nine, who was then engaged in receiving reports for the press, which by statute have precedence over all other matters. The Providence operator answered, that it could not be sent that night, as the delivery boy had gone home, to which the other answered that it must be, and the former replied by a sign expressing his concurrence. The Providence operator was engaged without cessation in receiving newspaper reports until half-past eleven o'clock P. M., when he had the message copied and sent to the attorney. When the attorney received it, it was too late to have the attachment made before the arrival of B., who returned to Rhode Island in the Stonington train that morning, and the plaintiffs lost the advantage of securing their debt by an attachment upon B.'s house and lot, which was worth over $12,000. B.'s firm afterwards went into bankruptcy, and all that the plaintiffs recovered upon their debt from the bankrupt estate was $500. Held, that the plaintiffs were not bound to exhaust their legal remedy against their debtors by the recovery of a judgment and the issuing of an execution before bringing an action against the telegraph company for their damages; that the measure of the damages was the amount of the debt and interest from the day of the delivery of the message, less the five hundred dollars received from the bankrupt estate of B.'s firm. The measure of damages should not be confined to the cost of sending the message and expenses incidental thereto.[41]

[41] Bryant *v.* Am. Tel. Co., 1 Daly (C. P.) 575.

*CHAPTER XXIX.

EQUITY JURISDICTION IN REGARD TO RAILWAYS.

SECTION I.

Injunctions against Railway Companies.

1. *Courts of equity will not assume the control of railway construction.*
2. *Will restrain company from taking lands by indirection.*
3. *Will restrain railway company, when exceeding its powers.*
4. *If company have power to pass highways, board of surveyors cannot stop them.*
5. *Board of surveyors should apply to the tribunals of the country.*
6. *Equity will restrain company from exceeding powers, or if they have ceased.*
7. *Injunctions to enforce the payment of compensation for land.*
8. *Injunction suspended, on assurance of payment, by short day.*
9. *Course of equity practice must conform to change of circumstances.*
10. *The course of proceeding in American courts of equity is the same.*
n. 12. *Review of the cases upon this subject.*

§ 205. 1. INJUNCTIONS in courts of equity, to restrain railways from exceeding the powers of their charters, or committing irreparable injury to other persons, natural or artificial, have been common for a long time in England and in this country.[1] But the courts of equity will not undertake to determine questions of engineering, and take the construction of a railway under their own control, in order to keep them within their powers.[1] A question of engineering is ordinarily referred to a disinterested engineer,[1] and in such case the court bases its order upon the report of such engineer.[1]

2. The courts of equity will enjoin a railway from taking land, ostensibly under their powers, for one purpose, when in fact they desire it for another, not within their powers.[1] In all cases of doubt, in regard to the extent of the powers of the company, the conclusion should be against its exercise, and the company should go to the legislature instead of the courts to have their powers enlarged.[1]

[1] Webb *v.* The Manchester & Leeds Railw., 1 Railw. C. 576; s. c. 4 My. & Cr. 116.

* 3. In an early case,[2] it was held by the Vice-Chancellor, that the fact that the company were proceeding to take lands, after their powers had expired, was no ground of interfering by injunction, unless it were shown that irreparable mischief would otherwise ensue. But the Lord Chancellor held, in the same case, that where it is clearly shown that a public company is exceeding its powers, this court cannot refuse to interfere by injunction.[3]

* 4. It has been held, that in a parish through which a railway

[2] River Dun Navigation Co. *v.* North M. Railw., 1 Railw. C. 135. The general ground upon which courts of equity will interfere, by injunction, in the case of railways, to keep them within their charter powers, is very fully stated in this case, by Lord *Cottenham*, Chancellor. "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 first case in which it was exercised, that of Agar *v.* The Regent's Canal Company, Cooper, 77, where Lord *Eldon* proceeds simply on this, — that he exercised the jurisdiction of this court for the purpose of keeping these companies within the powers which the acts give them, 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, for the purpose of keeping them within that limit which the legislature has thought proper to prescribe for the exercise of their powers. On that ground I should never be reluctant to entertain any such application. I think it most essential to the interests of the public that such jurisdiction should exist and should be exercised whenever a proper case for it is brought before the court, otherwise the result may be that, after your house has been pulled down and a railway substituted in its place, you may have the satisfaction, at a future period, of discovering that the railway company were wrong. It would be a very tardy recompense, and one totally inadequate to the injury of which the party has to complain; and individuals would be made to contend with companies who often have vast sums of money at their disposal, and that too, not the money of the persons who are contending. It is a most material point to consider, when you enter into a contest with an individual, whether he is spending his own money, or money over which he has a control, or in which he has comparatively a small interest. 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. That was Lord *Eldon's* ground in Agar *v.* The Regent's Canal Company, and I see no reason whatever to depart from the rule there laid down and acted upon; but then of course it must be a case in which the court is very clearly of opinion that the company are exceeding the powers which the act has given them."

[3] Directors of a limited company will not be restrained from going into business and exercising their borrowing powers until the whole of the nominal capital has been subscribed and every share allotted. M'Dougal *v.* Jersey Imperial Hotel Co., 2 H. & M. 528; s. c. 34 L. J., Ch. 28.

is granted, with the right to traverse the highways of such parish, or alter their levels, by restoring them to their former usefulness, or substituting others, to the acceptance of the board of surveyors of such parish, and if that is not done, the board of surveyors to cause it to be done, it was not competent for such board to take the law into their own hands, and put up fences, so as to obstruct the passage of engines across the highways, on the ground that their passing endangered the safety of the public.[4]

5. It was considered that the board of surveyors, in such case, should have applied to a court of law to award a mandamus, requiring the railway company to construct the substituted highways in the proper mode, or to a court of equity, for an injunction to effect the same object.[4] In such case it was held that the right of the surveyors was a private right, and that they were in no way interested in the question of public safety.[4]

6. Injunctions have been granted against companies proceeding to take land contrary to the provisions of their charter,[5] or where their powers had expired.[5] But where the company had rightfully purchased a lease of the land, and were rightfully in possession, a court of equity will not restrain them from proceeding to take the fee, upon the ground that they have no such power under their charter, as such proceeding would, upon the assumption, convey no title to the company, and there would be no necessity, or propriety, in withdrawing the determination of the mere question of title from the courts of law, whenever it shall arise.[6]

7. But where the company had taken possession of lands, and begun their works before paying or depositing the stipulated price, according to the requirements of their charter, it was held proper to restrain them by injunction, and also to dissolve the injunction, upon payment of the price into the Court of * Chancery, where the land-owner had chosen to come for redress, although the company's act required the deposit in the Bank of England, where the title was disputed, as in the present case.[7]

[4] The London & Br. Railw. *v.* Blake, 2 Railw. C. 322.

[5] Stone *v.* The Commercial Railw., 4 My. & Cr. 122; River Dun Nav. Co. *v.* North Midland Railw., 1 Railw. C. 135.

[6] Mouchet *v.* The Great Western Railw., 1 Railw. C. 567. See *ante*, § 97.

[7] Hyde *v.* The Great Western Railw., 1 Railw. C. 277. And in such case it is not necessary, in a bill for specific performance of a contract of sale of the land to the railway company, to make others having an interest in the land, as

8. In a case where the Court of Chancery considered that the company had taken possession of land without paying the price, according to the true construction of the contract between them and the owner, they held the party entitled to redress by way of injunction. But upon the company stipulating to pay the price by a short day, the injunction was suspended to give them opportunity to do so, the company undertaking that if this is not done the court shall regard the injunction as of the day of the arrangement.[8]

9. The rule laid down by Lord Chancellor *Cottenham*, and repeated in several cases, that it is the duty of the courts of equity (and the same is true of all courts and of all institutions) to "adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules, established under very different circumstances, decline to administer justice, and to enforce rights, for which there is no other remedy," is certainly worthy of the ablest, the wisest, and best judges who ever administered the chancery law of England or America.[9]

10. That similar rules of practice prevail in the American courts of equity will appear from an examination of the cases upon this subject. It was held the court will not interfere by injunction unless the danger is imminent and the damage * irremediable.[10] But the cases where courts of equity have interfered to prevent threatened mischief[11] and injury without reparation,[12] * are very numerous in the American reports of chancery decisions.

tenants for instance, parties to the bill. Robertson *v.* The Same, 10 Sim. 314; s. c. 1 Railw. C. 459.

[8] Jones *v.* Great Western Railw., 1 Railw. C. 684. In Maryland it is sufficient ground for an injunction to prevent a railway company from entering on lands that they have not paid or secured the damages. And an averment in the bill of irreparable injury is not required. Western, &c. Railw. *v.* Owings, 15 Md. 199.

[9] Taylor *v.* Salmon, 4 My. & Cr. 141; Mare *v.* Malachy, 1 My. & Cr. 559; Walworth *v.* Holt, 4 My. & Cr. 619–635.

[10] Spooner *v.* McConnel, 1 McLean C. C. 338; Mayor of Rochester *v.* Curtis, 1 Clarke, 336. See also Jerome *v.* Ross, 7 Johns. Ch. 315; Sutton *v.* Southeastern Railw., Law Rep. 1 Exch. 33; s. c. 11 Jur. N. S. 935.

[11] McArthur *v.* Kelly, 5 Ohio, 139.

[12] Bonaparte *v.* Camden & Amboy Railw., 1 Baldwin, 221; Gardner *v.* Newburgh, 2 Johns. Ch. 162; Stevens *v.* Buckman, 1 Johns. Ch. 318; Amelung *v.*

*SECTION II.

Injunctions to protect the Rights of Land-Owners, and of the Company.

1. *Company restrained from taking less land than specified in notice.*
2. *Sometimes injunction refused, where great loss will ensue.*
3. *Will not enjoin company to try constitutionality of their act.*
4. *May be restrained from carrying passengers beyond their limits.*
5. *So also from taking land beyond the reasonable range of deviation.*
6. *But not where the company have the right to take the land.*

§ 206. 1. In accordance with the opinion of the Lord Chancellor, in the note (2) to the last section, it has been held, that, where

Seekamp, 9 Gill & J. 468; Ross *v.* Paige, 6 Ohio, 166; Browning *v.* Camden & Woodbury Railw., 3 Green, 47; Jarden *v.* Phil., Wilm., & Balt. R., 3 Wharton, 502; Chapman *v.* Mad River & Lake Erie Railw., 6 Ohio N. S. 119.

Courts of Chancery have jurisdiction to proceed, by injunction, where public officers, under a claim of right, are proceeding illegally and improperly to injure or destroy the real property of an individual or corporation, or where it is necessary to prevent a multiplicity of suits, although the defendants may be sued at law.

As where the commissioners of highways, on the petition of the defendant, had laid out and recorded a private road or way from a lot of defendant, across the ropes and fixtures of the inclined plane of a railway which was used for the drawing up or letting down cars, for the conveyance of merchandise or passengers. Mohawk & Hudson Railw. *v.* Artcher, 6 Paige, 83. See also Belknapp *v.* Belknapp, 2 Johns. Ch. 463; Livingston *v.* Livingston, 6 id. 497.

The courts of equity will interfere, by injunction, in cases of nuisance often, and, where the right is clear and the wrong manifest, will do it without waiting the result of a trial at law. But where the thing complained of is not in itself a nuisance, but only capable of becoming such by relation, the courts of equity will not ordinarily interfere, in that mode, until the matter has been tried at law. But where the magnitude of the threatened injury bears no just proportion to the probability of its being justifiable, the court will not refuse its aid presently. Mohawk Bridge C. *v.* Utica & Schen. R., 6 Paige, 554; Bell *v.* O. & Penn. Railw., 25 Penn. St. 160. So also where a railway is being constructed so near a canal, having a prior grant, as to seriously endanger the works of the latter, this being first settled by an issue at law. Hudson & Delaware Canal Co. *v.* New York & Erie Railw., 9 Paige, 323; *In re* Long Island Railw., 3 Ed. Ch. 487.

In Sandford *v.* The Railw. Co., 24 Penn. St. 378, it is said: "If railway corporations go beyond the powers which the legislature has given them, and in a mistaken exercise of those powers interfere with the property of individuals, the court is bound to interpose by bill, injunction, or otherwise as the case may require." s. p. River Dun Navigation Co. *v.* North Midland Railw., 1 Railw. C.

the company gave notice to take a certain quantity of land, and subsequently proceeded to summon a jury to estimate a less quan-

135; Agar *v.* Regent's Canal Co., Cooper, 77. An injunction will not be granted to prevent a corporation from enforcing an assessment, by declaring its proceedings illegal, where the consequences would be injurious to the corporation and of no substantial benefit to the complainants. See Jones *v.* City of Newark, 3 Stockton, Ch. 452, where this subject is ably discussed.

In Tucker *v.* Cheshire Railw., 1 Foster, 29; s. c. 1 Am. Railw. C. 196, it was considered material to the inquiry, whether the defendants' bridge so interfered with a former toll-bridge across the Connecticut River, as to justify an injunction, that railway communication was not in use, at the date of the plaintiff's grant, and that it could not therefore have been in the contemplation of the legislature to exclude it, and that a railway bridge did not subserve the same purpose for which the toll-bridge was erected.

And in Newburyport Turnpike Co. *v.* Eastern Railw., 23 Pick. 326, it was held, that a statute, giving railways the power to raise or lower any turnpike, or way, for the purpose of having their railway pass over or under the same, will justify a railway in raising a turnpike-road to enable them to pass it upon a level, and an injunction was denied.

And where the charter gave the company the right to construct lateral routes, it was held that a shareholder could not restrain the company from the exercise of such powers as were conferred by the charter, and in the manner therein specified, on the ground that it will diminish his dividends, or impair the resources of the company; and that where the charter fixes no limit of time for the exercise of such powers, the court will not ordinarily prescribe one. But such grants must be express, and will not be implied. Newhall *v.* Chicago and Galena Railw., 14 Illinois, 273.

In Morgan *v.* New York & Albany Railw., 10 Paige, 290, it was held, that an injunction, which is to deprive the officers of a corporation of the control of all its property, will not be allowed *ex parte*.

In cases of great injury and where irremediable mischief will be likely to ensue, injunctions are commonly allowed *ex parte*, and the defendant may move to dissolve before answer. Minturn *v.* Seymour, 4 Johns. Ch. 173. See also Poor *v.* Carleton, 3 Summer, 70; New York Printing & Dyeing Establishment *v.* Fitch, 1 Paige, 97.

But in cases of importance, involving no pressing peril, an *ex parte* injunction should not be granted. Accordingly one was denied, to restrain defendant from running a steamboat, and landing passengers at the plaintiff's dock. N. Y. Print. & Dye. Est. *v.* Fitch, *supra*. So also to take from the directors of a bank the control of its business, on the ground that their election was obtained by fraud. Ogden *v.* Kip, 6 Johns. Ch. 160. See also Stewart *v.* Little Miami Railw. 14 Ohio, 353; Ramsdall *v.* Craighill, 9 Ohio, 197; Walker *v.* Mad River Railw., 8 Ohio, 38.

But where, by special act, a railway was required to pass through a certain street, thereafter to be laid, on certain conditions, and not in any parallel street, the Court of Chancery enjoined the company from entering upon private land, for the purpose of locating their road, until the street prescribed in the act

tity, they should be restrained from proceeding, by injunction, at the suit of the land-owner, the notice to treat constituting the relation of vendor and purchaser between the company and land-owner, as to all the land included in the notice.[1]

2. * In one case Lord *Cottenham*, Chancellor, declined interfering on behalf of a land-owner, although the possession of the land had been obtained from a tenant of the plaintiff by the company, by means of circumvention and fraud. The ground of the refusal seems to have been, that the road having been already built, the effect of the injunction prayed for would be to turn the defendants out of the use of it, and virtually put it into the plaintiff's control. The Lord Chancellor says: "The case originally may have been a case of waste, — waste occasioned by the cutting of the tram-road, and the laying of the iron rails over the plaintiff's land, but what is now claimed by the defendants is simply a right of way; and if they are not entitled to that right, they are mere trespassers, and

should be opened. Jarden *v.* Phil., Wilm., & Balt. Railw., 3 Wharton, 502. So also from condemning any land, which, by their charter, they have no power to take. Moorhead *v.* Little Miami Railw., 17 Ohio, 340.

But where the defendant had addressed letters to the plaintiff, stating the terms upon which he would allow them to carry their railway over his land, and the company commenced their operations upon the land, in conformity with the propositions, and with the knowledge of defendant, it was held that plaintiffs had thereby accepted the defendant's proposition, and were bound by its terms, and that the same was consequently binding upon defendant, citing Mactier *v.* Frith, 6 Wend. 103, 119. The plaintiffs having substantially performed the contract, and the defendant having shut up the road, after it had been used several months, a perpetual injunction was granted against defendant obstructing the road, but without prejudice to any claim he might have against the plaintiffs. New York & New Haven Railw. *v.* Pixley, 19 Barb. 428.

[1] Stone *v.* The Commercial Railw., 1 Railw. C. 375; s. c. 4 Mylne & C. 122. But in Hedges *v.* Metropolitan Railw., 28 Beav. 109, it was held that the notice of a railway company to take lands cannot be considered more obligatory than contracts, and, after great delay in proceeding on such notices, they will be considered as abandoned. And in King *v.* Wycombe Railw., 28 Beav. 104; s. c. 6 Jur. N. S. 239, it was held the notice to treat alone, not followed by any act to obtain possession, was not a contract binding upon the company. And in Mouchett *v.* The Great W. Railw., 1 Railw. C. 567, the Vice-Chancellor declined to restrain the company from assessing the value of the fee-simple in land, upon the alleged ground that they were not authorized to take such estate, as in that case the proceedings will be merely void, and it is not claimed the company are not entitled to the present use and occupancy of the land, or that they are so using it as to cause irreparable injury to the inheritance. See Lund *v.* Midland Railw., 34 L. J. Ch. 276; Mason *v.* Stokes Bay Pier & Railw. Co., 32 L. J. Ch. 110.

the plaintiffs have their proper legal remedy against them as such." [2]

3. But where a land-owner threatened forcible resistance to the progress of the railway, the Court of Chancery declined to interfere.[3] The Court of Chancery declined also to interfere and enjoin a railway company from building their road, at the suit of a land-owner, on the alleged ground of the unconstitutionality of the company's charter. It was held that the case must take the ordinary course of judicial proceedings, and for all * preliminary purposes, and, until the hearing upon the merits, the constitutionality of the company's act would be assumed.[4]

4. But where the charter of a railway company gave them the exclusive right of carrying passengers and freight from Atlanta to Macon, it was held that the company could not, under this charter, carry from their station in Macon, through the city, to the station of another railway, for the convenience of their customers, and they were enjoined from so doing.[5]

5. And it was held, that a railway had no right to take land for a warehouse four hundred yards from their track, and build a track to such point, although the land requisite for both purposes did not exceed five acres, and the company were perpetually enjoined.[6]

6. But a court of equity will not enjoin a railway company from

[2] Deere *v.* Guest, 1 My. & Cr. 516. But see Warburton *v.* The London & Blackwall Railw., 1 Railw. C. 558. The plaintiff should satisfy the court that he has sustained substantial damage, from the violation of a legal right, to entitle himself to an injunction. Holyoake *v.* Shrewsbury & Birmingham Railw., 5 Railw. C. 421. And in general, we apprehend, courts of equity will not enjoin the operations of railways and other public works, until after notice and opportunity to be heard upon answer and affidavit. In such cases the answer of the corporation, under its corporate seal without oath, is not regarded as equivalent to the answer of a natural person upon oath, but only as the answer of a natural person not upon oath, and consequently as nothing more than a denial of the facts alleged in the bill, by way of plea, and not as of any force by way of evidence, and, therefore, not such a denial of the equity of the bill as to entitle the party to a dissolution of the injunction. Bouldin *v.* Mayor, &c. of Baltimore, 15 Md. 18.

[3] Montgomery & West Point Railw. *v.* Walton, 14 Ala. 207.

[4] Deering *v.* York & Cumberland Railw., 31 Me. 172. But the courts of equity will enjoin the company from taking lands for warehouses and other erections which are not authorized by their charter. Bird *v.* W. & M. Railw., 8 Rich. Eq. 46.

[5] Mayor of Macon *v.* Macon & Western Railw., 7 Ga. 221.

[6] Bird *v.* W. & M. Railw., 8 Rich. Eq. 46. It was held in this case, that

constructing their road across the plaintiff's land, when the charter provides a mode for the land-owner to obtain an appraisal of compensation, and he has not resorted to it.[7]

*SECTION III.

Equitable Interference in regard to the Works.

1. *No universal rule upon the subject of equitable interference.*
2. *These matters often arranged by mutual concessions, and an issue at law.*
3. *Cases illustrating the mode of proceeding in courts of equity.*
4. *Where company required to do least possible damage.*
5. *If the company have removed a highway* ultra vires, *a court of equity will not always compel its restoration.*

§ 207. 1. In consequence of the discretion which courts of equity assume to exercise in regard to decreeing specific performance of contracts and obligations, or restraining the parties from violating the duties resulting therefrom, there will be likely to be more or less apparent inconsistency in the disposition of different cases. As no intelligible rule can be laid down upon the subject, it will be useful briefly to refer to the more important decided cases bearing upon the question.

2. Where a controversy arose between the land-owner and the company, in regard to the right of the company to occupy a highway by substituting another in a different direction, and which,

when the court entertain jurisdiction for the purpose of enjoining the company from the further use of land, they may grant compensation for the injury already committed, by reference to a master, or directing an issue *quantum damnificatus*. And a railway company will be enjoined, after the completion of their road, from taking land from one person merely to enable them to carry out an agreement with another person. Vane *v.* Cockermouth, &c., Railw., 12 L. T. N. S. 821. And see Flower *v.* London, &c., Railw., 2 Drew & Sm. 330; s. c. 11 Jur. N. S. 406; Wrigley *v.* Lancashire & Yorkshire Railw., 4 Giff. 352; Weld *v.* South-western Railw., 32 Beav. 340; s. c. 33 L. J. Ch. 142.

[7] New Albany & Salem Railw. *v.* Connelly, 7 Porter (Ind.), 32. The defendants were raising a footway, under powers contained in local acts, in front of plaintiff's house, which would shut off his access to a warehouse, and otherwise damage his property. It appearing that defendants were authorized under their acts to alter the footway, and also that the plaintiff had sustained and would sustain injury thereby, an injunction was refused, but it was referred to chambers to ascertain and certify the amount of the injury and what would be a proper sum to be awarded as damages for such injury. Wedmore *v.* Bristol, 7 L. T. N. S. 459.

it was claimed, would very materially affect the value of the plaintiff's land, for building purposes, by depriving him of access to the highway, the Vice-Chancellor held, that it was not a case for the interference of a court of equity, at least until the company had completed their substituted road. But the Chancellor considered it a case where the court should interfere, to enable the company to know at once whether the proposed road, when properly completed, would meet the requirements of their charter. For this purpose he granted a temporary injunction against occupying the old road, until the new one shall be completed, — the plaintiff undertaking to bring an action against the company, — and the company admitting for the purpose of the action, that they have taken the old road, and the plaintiff admitting that the substituted road is, in effect, completed, in order to try the question whether, when completed, it will be a proper substitution.[1] The company, in another case, were * enjoined from the use of works, erected on a site prohibited in their charter, but with liberty to use the erection, as before, upon their undertaking to erect no more, and to apply for a rehearing, or to prosecute an appeal to the House of Lords.[2]

[1] Kemp *v.* The London & Brighton Railw., 1 Railw. C. 495. In this case, after the proposition of his lordship to send the case to the jury, upon its being suggested, by the counsel for the company, that the form of action would not inform them, what kind of road they were bound to make, his lordship answered, "I am not about to direct an action, to try what sort of road the company are to make. The question before me is, whether the proposed road is such as, under the act, entitles them to take the old road." Bell *v.* The Hull and Selby Railw., 1 Railw. C. 616. The injunction was here retained until the rights of the parties should be determined by an action at law, to be brought for that purpose and tried under certain admissions. 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 & Great Malvern Railw., 1 De G. J. & Sm. 423; s. c. 9 Jur. N. S. 951. And see Edinburgh & Glasgow Railw. *v.* Campbell, in the House of Lords, 4 McQu. 570; s. c. 9 L. T. N. S. 157; Attorney-General *v.* Dorset Railw., 9 W. R. 189; Ware *v.* Regent's Canal Co., 3 De Gex & J. 212; s. c. 5 Jur. N. S. 25. And in Illinois it has been intimated that the same doctrine would be maintained. Jacksonville, &c., Railw. *v.* Kidder, 21 Ill. 131.

[2] Gordon *v.* Cheltenham & Great W. Union Railw., 5 Beav. 229; s. c. 2 Railw. C. 800. It was considered in this case that a party will not be precluded from relief, by acquiescence in what he may be led to consider a mere temporary violation of his right, where no evidence is given of expense incurred by another party, in

3. In a case where the company were proceeding to arch over a street, in order to erect a station, it was held that they should be restrained, by injunction, until the question of their right to do so should be settled in a court of law. And for this purpose an action was directed to be tried before the barons of the Exchequer, and their opinion being certified in favor of the right claimed by the company, "if it was necessary, or reasonably convenient for the construction of a station and proper warehouses," the Lord Chancellor held that the injunction should be dissolved, the fact of the commencement of the works by the defendants being sufficient proof of the necessity for, and the convenience of, such buildings.[3]

So, too, an injunction was continued temporarily against the trustees of a turnpike road, who proposed to remove stone blocks, *laid across their road by a railway company, in order to pass from their railway to a wharf occupied by them, for the convenience of loading and unloading goods upon railway carriages, the company not proposing to alter the surface of the turnpike road, or to cross it by means of railway carriages. But upon notice being given to the trustees of the turnpike road, and the matter being discussed, both the Vice-Chancellor and the Lord Chancellor regarded the acts of the railway company as manifestly wrong, inasmuch, as by their act, they had no power to deal with the turnpike road at all, for the mere purpose of access to their railway, but only to use it as it was, and if they proposed to cross it with their railway, they were bound, by the express terms of their act, to do so by means of a tunnel, or a bridge, and that it was not proper to continue the injunction during the trial of the question at law.[4]

So, too, where the company were by their act prohibited from erecting any station at a given point, but built a platform and stairs, to enable them to take up and set down passengers, and proposed to build a road for access to such point, they were temporarily enjoined from the use of such erections, which was made

faith of such acquiescence. Clarence Railw. *v.* Great North of England, Clarence, & H. Railw., 2 Railw. C. 763. See *post*, § 220, and cases cited, *ante*, § 160.

[3] Attorney-General *v.* The Eastern Counties & Northern & Eastern Railw. Companies, 2 Railw. C. 823.

[4] London & Brighton Railw. *v.* Cooper, 2 Railw. C. 312. It seems to be the uniform practice in the English Railway Acts to require all road and farm crossings to be either by tunnels or bridges, or else to be protected by gates, under the control of the officers of the company, which are not allowed to be open while any train is due.

final upon hearing, the Vice-Chancellor considering that this, when the road was built, was a station, but that this prohibition did not prevent the company from stopping their engines where they pleased, and that the passengers might then get in, or out, as they best could.[5]

So, where the company were proceeding to build an arch over a mill race, for the purpose of supporting an embankment, and it appearing that the mill would suffer damage if the arch were not built of larger dimensions, an injunction was granted to restrain the company from making over the mill-race an arch of *less dimensions than what was requisite to secure the mill from injury, the company by their act being bound to make compensation to persons whose property might sustain damage.[6]

4. But where the company were, by their act, required to conduct their works, doing as little damage as possible, it was held, by the Lord Chancellor, that nothing but necessity could justify the company in carrying on their works in such a manner, or on such a level, as would cause serious damage to the owner of the land.[7] The maxim, *Sic utere tuo ut alienum non lædas*, applies to

[5] Lord Petre *v.* The Eastern Counties Railw., 3 Railw. C. 367. But in Eton College *v.* Great W. Railw., 1 Railw. C. 200, it is held, that a prohibition from building a station within three miles of Eton College, does not preclude them from taking up and setting down passengers within that distance, and renting rooms in a public-house for the convenience of such passengers.

[6] Coats *v.* The Clarence Railw., 1 Russell & Mylne, 181. The extent of the requisite arch in this case was determined by the report of an engineer, to whom the question was referred by the Lord Chancellor. In Manser *v.* The N. & E. Railw., 2 Railw. C. 380, the Chancellor held, that in a case where the affidavits on points of engineering are conflicting, the court will seek for professional assistance of some impartial engineer, to form a decision upon them. Upon the disputed points the Chancellor says: "I should like to have the affidavit of some eminent engineer." Where a railroad company agreed with a land-owner not to erect any building, except their proposed railway, higher than thirty-three feet, on the land to be taken by them from him, the company was withheld from breach of this covenant by injunction; and it was held that the circumstance, that a work to be made in breach of a local covenant is one of great public importance, is not sufficient to induce the court to refuse to restrain such breach by injunction. Lloyd *v.* London, &c. Railw., 2 De G. J. & S. 568; s. c. 34 L. J. Ch. 401.

[7] Manser *v.* The Northern and Eastern Counties Railw., 2 Railw. C. 380. Some very sensible remarks fell from the Lord Chancellor in this case, in regard to the one-sidedness of testimony upon points of engineering, and the embarrassment attending the trial of cases depending upon such questions, unless the courts are enabled to command the aid of masters wise and experienced in re-

persons acting under enclosure, and other acts of parliament of a similar nature.[8]

5. In a recent English case [9] it was held, and with great wisdom as it seems to us, that where a railway company have diverted a public road, *ultra vires*, but with a *bona fide* view to the convenience of the public, a court of equity will not compel them to replace the road, if that will cause greater inconvenience to the public, or the complaining section of the public, than to suffer it to remain as the company have placed it, without due warrant. The information in such case will be dismissed, but without prejudice to proceedings at law.

*SECTION IV.

Further instances of Equitable Interference as to Works.

1. *In a clear case equity will direct the mode of crossing highways.*
2. *Mandamus the more appropriate remedy in such cases.*
3. *Towns may maintain bill in equity to protect highways.*

§ 208. 1. The subject of the interference of the courts of equity to enforce contracts between the promoters of railways and the land-owners along the proposed line, has been considered in a former chapter.[1] Where a railway company were attempting to carry a turnpike road over their railway in a manner inconvenient to the public use of such road, an injunction was granted to restrain them from doing it in that mode, the Vice-Chancellor explaining in what mode the thing should be done, or what results were to be effected, to escape from the injunction.[2] But this in-

gard to such acts as come in question. And see Birmingham Water-Works Co. *v.* London & Northwestern Railw., 4 L. T. N. S. 398; Dover Harbor *v.* London, &c. Railw., 3 De G. F. & J. 559; s. c. 7 Jur. N. S. 453.

[8] Dawson *v.* Paver, 5 Hare, 415; s. c. 4 Railw. C. 81.

[9] Attorney-General *v.* Ely, &c. Railw., Law Rep. 6 Eq. 106.

[1] *Ante*, § 8. See also *ante*, § 97, for further statement of grounds of equitable interference.

[2] Attorney-General *v.* London and Southw. Railw., 3 De G. & S. 439; Hodges on Railw. 506; 13 Jur. 467. In Attorney-General *v.* Dorset Railw., 9 W. R. 189 (s. c. 3 L. T. N. S. 608), it appeared, by the plans and sections deposited by a railway company, that they intended to carry their road across a public way by means of a skew bridge. Instead of doing so, the company diverted the road for some distance, and afterwards restored it to its former course by means of a bridge which crossed the railway at right angles, thus forming two abrupt

junction was granted, without prejudice to any application the company might make to the Board of Trade. But if the case is doubtful, as, for instance, a claim for land damages, the court will not ordinarily interfere, by injunction, but leave the party to pursue his claim at law.[3]

* In some cases where the company have given notice of purchase of lands, which, under the English statute, has the effect to create the relation of vendor and purchaser, but omit any further proceedings, the land-owner has been allowed a decree, equivalent to specific performance.[4]

2. But the more usual remedy, in such cases, as we have seen, is by mandamus, and that, although an old jurisdiction, is not taken away by a new remedy. Yet if a new *right* be given, and a

and dangerous curves. The court granted an injunction until further order, restraining the company from proceeding with the works, and directed that in the mean time a competent person should inquire and report whether any deviation was necessary, and if so, how it could most conveniently be effected. See also Attorney-General *v.* Tewkesbury & Great Malvern Railw., 1 De G. J. & Sm. 423; s. c. 9 Jur. N. S. 951. And where a local board of health withdrew its opposition to a railway bill, on the insertion in the act of a clause, that no bridge carrying a road over the railway, in their district, should have an approach with a slope of more than one in thirty; and to make such a slope required an encroachment upon the land of another person, who obtained an injunction against it, and the company made the approach with a slope of one in twenty; upon an information by the Attorney-General, in equity, it was held that it was no excuse for departing from the requirements of the act, that the road could not otherwise be carried over the railway, and a mandatory injunction issued requiring conformity to the act. Attorney-General r. Mid-Kent Railw., Law Rep. 3 Ch. 100.

[3] South Staffordshire Railw. *v.* Hall, 1 Sim. N. S. 373; s. c. 3 Eng. L. & Eq. 105. See also The London & N. W. Railw. *v.* Smith, 1 Mac. & G. 216, 13 Jur. 417; East & W. I. Docks & Birmingham J. Railw. *v.* Gattke, 3 Mac. & Gor. 155; s. c. 3 Eng. L. & Eq. 59.

[4] Walker r. The Eastern Counties Railw., 6 Hare, 594; s. c. 5 Railw. C. 469. And where the contract contains stipulations, in regard to communications with other lands, and similar accommodations, the arrangement in regard to them will be determined by the master. Saunderson *v.* Cockermouth & W. Railw., 11 Beav. 497; s. c. 19 Law J. Ch. 503. But it has been held, that where the contract provides that the price of land shall be settled by an arbitrator, it is not such a contract as a court of equity will ordinarily enforce. Milnes *v.* Gery, 14 Vesey, 400; Adams *v.* London & B. Railw., 19 Law J. Ch. 557, 2 Mac. & Gor. 118. See also on this subject, Morgan *v.* Milman, 10 Hare, 279; s. c. 13 Eng. L. & Eq. 312; s. c. affirmed, 3 De G. M. & G. 24; s. c. 17 Eng. L. & Eq. 203. And the party claiming specific performance must not be premature in his application, or have been guilty of unreasonable delay. Bodington *v.* Great W. Railw., 13 Jur. 144; South E. Railw. *v.* Knott, 10 Hare, 122; s. c. 17 Eng. L. & Eq. 555.

special remedy provided for enforcing it, such remedy must be pursued.[5]

3. And it has been held, that where a railway claim to maintain their road upon a public highway, the town, within which the highway is situated, may sustain a bill in equity, for the purpose of trying the question of the right of the company, under their charter, to maintain their road in that place.[6]

*SECTION V.

Injunctions to carry into effect Orders of Railway Commissioners.

1. *Railway companies perform important public functions.*
2. *Courts of equity will enforce order of railway commissioners, without revising.*

§ 209. 1. The office of the former Board of Trade in England, and that of Railway Commissioners in many of the American

[5] *Ante*, § 81; Adams *v.* London and Blackwall Railw., 2 Hall & T. 285; s. c. 6 Railw. C. 271, 282; Williams *v.* So. Wales Railw., 13 Jur. 443; 3 De G. & S. 354.

[6] Springfield *v.* Conn. River Railw., 4 Cush. 63. A railway company will not be restrained by injunction from stopping up an ancient highway, in a case where it is doubtful upon the evidence whether the public right of way has not been extinguished by disuse or obstruction. Freeman *v.* Tottenham, &c. Railw., 13 W. R. 335; s. c. 11 L. T. N. S. 702. In a well-considered case, Chapman *v.* Mad R. & Lake Erie Railw., and Sandusky City & Indiana Railw., 6 Ohio N. S. 119, where the first company defendants, having received from private parties donations of land, subscriptions of stock, and payments in money, in consideration that it should locate its road in a particular place, and allow private side tracks and warehouse privileges in connection therewith, it was held, upon a bill in equity, praying an injunction, that the company will not be allowed to effectuate a change in fact, though not in name, of the line of its road, so as to remove it from such place, by getting up a new company and constructing a new road, parallel with its old one, under a different charter, and permitting its old line to go to decay, without compensating the parties, with whom it had made such contract, for the former location.

And the responsible defendant having leased the line of the other company's road, and suffered its own to fall to decay, so that an injunction restraining them from using the new line, unless they restored the old one, would not relieve the plaintiffs, and it being questionable whether the company had the means of restoring the old line, and the new one being the preferable one, it was held a proper case for a decree compensating the orator in damages.

And a railway company is bound to indemnify a town for any alteration made in the highways of the town by the company. Hamden *v.* New Haven, &c. Railw., 27 Conn. 158.

states, is the same. And in England, this office of the Board of Trade is now, or was for a time, performed by a board denominated The Railway Commissioners. The office of such commissioners, both in England and this country, seems to be, the protection of the public from abuses of railway companies. The jurisdiction of such commissioners is therefore of necessity confined to such matters as affect the public, and does not ordinarily extend to such private matters, in the management of railways, as affect the stockholders only in their pecuniary interests and relations. This result seems to follow, almost of necessity, from the very nature of the subject-matter. So far as the public security and convenience are concerned, both in regard to the transportation of passengers and freight, and the carrying of parcels by express, these companies are public functionaries, so to speak, and as such, under the supervision and control of the public police, as much as other public officers; but in regard to their stock, and the management of their internal pecuniary functions, they are, to all intents, private companies, as much so as manufacturing or other mere business corporations.

* 2. Courts of equity have sometimes lent their aid to prohibit railway companies from the violation of the orders of the railway commissioners, where the public security would be thereby endangered. This was done, in a recent case, where the railway commissioners having inspected a railway, about to be opened, directed the company to postpone the opening, and the company, notwithstanding, proceeded to open their road for business. The Attorney-General, as *parens patriæ*, applied for an injunction, which was granted, the Master of the Rolls, Sir *J. Romilly*, refusing to inquire into the sufficiency of the reasons which induced the commissioners to withhold their consent, saying that the company could apply to the Court of Queen's Bench for a mandamus to the commissioners to dissolve the prohibition, if they wished to try that question.[1]

[1] 5 & 6 Vict. c. 55, § 6; 7 & 8 Vict. c. 85, § 17; Attorney-General *v.* Oxford, Worcester, & Wolverhampton Railw., Weekly Reporter, 1853, p. 330; Hodges on Railws., 671; *post*, § 247.

SECTION VI.

Equitable Interference where Company have not Funds.

1. *English courts will not allow company to take land when their funds fail.*
2. *This has been qualified by later cases, and is very questionable.*
3. *Equity will not interfere where company propose to complete but part of works.*

n. 4. *Cases reviewed, and result stated.*

§ 210. 1. The courts of equity seem, at one time certainly, to have considered the undertaking of the company to build the road, so far the equivalent for the privilege conferred upon them, of taking private property against the will of the owner, that if it were shown conclusively that the company never could complete their undertaking, they would restrain them by injunction from taking land under the powers granted them.[1] But in another case,[2] Lord *Eldon* explains the ground of his former decision thus: "In Agar *v.* The Regent's Canal Company, I acted on the principle that where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed * undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the legislature has given the speculators the right to carry the canal can show that the persons so authorized are unable to complete their work, and is prompt in his application for relief, grounded on that fact, this court will not permit the further prosecution of the undertaking." This we apprehend would, at the present day, require to be received with considerable allowance.

2. In another case,[3] Lord *Cottenham* thus explains Lord *Eldon's* decision above: "I apprehend that Lord *Eldon* must have gone upon this ground, that, where acts of parliament impose certain severe burdens upon individuals, by interfering with their private rights and private property, for the purpose of obtaining some great public good, if the court sees that the undertaking cannot be completed, and that therefore the public cannot derive the benefit which was to be the equivalent for the sacrifice made by the public, the court will protect the individual from being compelled

[1] Agar *v.* The Regent's Canal Co., Cooper, 77.
[2] The Mayor of King's Lynn *v.* Pemberton, 1 Swanst. 244.
[3] Salmon *v.* Randall, 3 Mylne & Cr. 439.

to make the sacrifice, under the circumstances, and until it appears that the public will derive the proposed benefit from it." And even with this qualification, it seems to us that it would be impossible for a court of equity to exercise much control over these enterprises, without virtually assuming a supervision over the doings of the legislature and the business of the country which would be impracticable and invidious. It is obvious this purpose has been virtually abandoned in the English courts of equity.[4]

* In the case of Gray *v.* The Liverpool & Bury Railway,[4] the Lord Chancellor declined to interfere, until the legal right was determined in a court of law, if either party desired it, the injunction standing, in the mean time, to sustain all existing rights.

3. But a court of equity will not, it seems, now interfere, because a railway company do not purpose to complete their entire line. The remedy, in such case, if any, is by mandamus.[5] A canal company were restrained by injunction from converting a canal, for erecting which the company were incorporated, into a railway.[6] But where the directors of a railway company, with the concurrence of the

[4] Blakemore *v.* The Glamorganshire Canal Navigation, 1 Myl. & K. 154; Gray *v.* The Liverpool & Bury Railw. Co., 9 Beav. 391; s. c. 4 Railw. C. 235. In this last case, the company had, to induce the plaintiff to withdraw opposition, consented to incorporate into their act a provision, that the line of the railway should not come within a certain distance of a bridge named, without the plaintiff's consent. Upon examination, it turned out that plaintiff owned all the land within the line of deviation, from that point, so that the road could not proceed without the plaintiff's consent. The Master of the Rolls held this could make no difference, even in the construction of the stipulation. The parties must be presumed to have understood the matter, and to have made their contract understandingly, and the court should not defeat it.

See also Lee *v.* Milner, 2 M. & W. 824, and the remarks of *Alderson*, B., limiting the right of a court of equity to restrain the company from proceeding to take land, to cases where it is evident they have virtually abandoned the enterprise, and have no longer any serious expectation of accomplishing it, which to us appears the only practicable ground upon which a court of equity could interfere. Thicknesse *v.* Lancaster Canal Co., 4 M. & W. 472.

[5] The Attorney-General *v.* The Birmingham & Oxford J. Railw., and other companies, 4 De G. & S. 490; s. c. 3 Mac. & G. 453; 7 Eng. L. & Eq. 283. See Reg. *v.* Eastern Counties Railw., 10 Ad. & Ell. 531; Cohen *v.* Wilkinson, 12 Beav. 135, 138; s. c. 1 Hall & T. 554; 5 Railw. C. 741. Acts of parliament authorizing companies to make railways are regarded only as enabling acts which give powers, but do not render compulsory or obligatory the exercise of those powers. Scottish Northeastern Railw. *v.* Stewart, 3 McQ. H. L. Cas. 382.

[6] Maudsley *v.* Manchester Canal Co., Cooper's C. Pr. 510.

shareholders, on finding the original undertaking impracticable, proceeded to construct a small portion of the works, which were nearly completed, the court declined to interfere by injunction, at the instance of the minority of shareholders, on the ground of their acquiescence, they having known, or had the means of knowing, the progress of the acts complained of.[7]

*SECTION VII.

Equitable Control of the Management of Railway Companies.

1. *Courts of equity will not interfere in matters remediable by shareholders.*
2. *Will not restrain company from declaring dividend till works are finished.*
3. *Will interfere to enforce public duty rather than a private one.*
4. *Will restrain such companies from diverting funds to illegal use.*
5. *Interference of court of equity cannot be claimed upon the assumption of the practical dissolution of company.*
6. *Directors liable to same extent as other trustees.*
7. *Managing committee not chargeable with the fraudulent acts of its members.*
8. *Courts of equity will not enforce resolutions of directors, or company.*
9. *Suits in equity in favor of minority against majority.*
10. *Bill in equity may be maintained by a single stockholder.*
11. *Necessary requisites in form of such a bill.*
12. *Directors not responsible for purchases made on credit of the corporation.*
13. *Minority may insist upon continuing the business till charter expires.*
14. *Minority may have bill against directors for not resisting illegal tax.*
15. *Company may expend funds in resisting proceedings in parliament.*
16. *Equity will not compel directors to declare dividend, unless they wilfully refuse.*
17. *Directors only liable for good faith and reasonable diligence.*

§ 211. 1. There have been numerous instances of application to courts of equity to interfere in the control of the management of railway companies, in respect of their internal concerns. But as a general rule it is said,[1] whenever the acts complained of are capable of being rectified by the shareholders themselves, in the exercise of their corporate powers, equity will not interfere, but

[7] Graham *v.* Birkenhead, Lancashire, & Cheshire J. Railw., 2 Mac. & G. 146; 2 Hall & T. 450.

[1] Hodges on Railways, 67. See Howe *v.* Derrel, 43 Barb. 504. Thus, in Orr *v.* Glasgow, &c. Railw., before the House of Lords, reported in 3 McQu. 799; s. c. 6 Jur. (N. S.) 877, it was held that the directors are the servants of the company, not of each individual shareholder; and if a shareholder is aggrieved by their misconduct, his course is to call upon the company to bring the directors to account, and then, that being done, to get relief from the company itself.

leave questions of internal management and regulation to be settled by the shareholders in corporate meeting.[2] And especially is this the case where the act complained of is clearly within the power of the company.[3]

* 2. Hence it was held, that equity had no jurisdiction to restrain a railway company from declaring a dividend until their works were all completed, there being no provision in the acts to that effect.[3]

3. But courts of equity are far more ready, upon a bill properly framed, to interfere to enforce a public duty of a railway company, than a mere private duty.[4]

[2] See Bailey *v.* Power Street Church, 6 Rhode Island, 491.

[3] Brown *v.* Monmouthshire Railw. & Canal Co., 13 Beav. 32; s. c. 4 Eng. L. & Eq. 113. But where the charter of a railway company provided, that unless certain portions of the work should be completed within a specified time, no dividend should be declared by them until the works were so completed, so far as their ordinary shares were concerned, the company were enjoined from making any dividend contrary to the charter. Allen *v.* Talbot, 30 Law Times, 316. But a railway company will be restrained, at the information of a relator, from carrying on a trade not authorized by the act constituting it. Attorney-General *v.* Great Northern Railw., 1 Drew. & Sm. 154; s. c. 6 Jur. (N. S.) 1006. And where the articles of association of a company contained no power to issue preference shares, and the company in general meeting passed a resolution for the issue of some shares with a preferential dividend, the court, upon motion for an injunction by three shareholders, who had notice of, but did not attend, such general meeting, granted an injunction restraining the issue of such preference shares. Hutton *v.* Scarborough Cliff Hotel Co., 2 Drew. & Sm. 514.

[4] In Buck Mountain Coal Co. *v.* Lehigh Coal & Nav. Co., 50 Penn. St. 91, it was held, that a bill in equity to enforce the performance of a public duty by a corporation, cannot be maintained by a private party, in the absence of any special right or authority. And where the slackwater navigation of the Lehigh Coal and Navigation Company, with dams, locks, and other appliances, were damaged, broken, and swept away by a flood, it was held that a bill in equity could not be maintained by another company to enjoin the said corporation from neglecting to repair and put in operation their navigation; and that the complainants had no right to a decree compensating them for damages sustained in consequence of the non-repair. The court, intimate, however, that a bill might probably be maintained in behalf of the Commonwealth by the Attorney-General. Buck Mountain Coal Co. *v.* Lehigh Coal & Nav. Co., *supra*. And equity will not interfere by injunction to redress public nuisances, when the object sought can be attained by ordinary legal methods. Jersey City *v.* Hudson, 2 Beasley, 420.

The court will not grant an injunction to restrain a railway company from charging a carrier otherwise than equally with all other persons. Sutton *v.* Southeastern Railw., Law Rep. 1. Exch. 33; s. c. 11 Jur. (N. S.) 935; 35 L. J.

* 4. So, too, as we have seen,[5] they very often interfere to restrain companies of this kind from making use of their funds for a purpose wholly aside of the general object of their incorporation, and this will be done at the suit of shareholders, although a majority may have sanctioned by their votes the act complained of.[6]

Exch. 38; but see Baxendale *v.* North Devon Railw., 3 C. B. (N. S.) 324. See Jones *v.* Eastern, &c. Railw., 3 C. B. (N. S.) 718; Cooper *v.* London, &c. Railw., 4 C. B. (N. S.) 738; Baxendale *v.* Great Western Railw., 5 C. B. (N. S.) 309; Nicholson *v.* Great Western Railw., 5 C. B. (N. S.) 366.

A railway company will not be allowed to grant to an omnibus proprietor the exclusive privilege of carrying passengers between another town and one of its stations. Marriott *v.* London & Southwestern Railw., 1 C. B. (N. S.) 499. But a company will not be enjoined from allowing a cab proprietor the exclusive privilege of plying within their station. Beadell *in re*, 2 C. B. (N. S.) 509. Even where it is charged that occasional delay and inconvenience are thereby caused to the public. Painter *in re*, 2 C. B. (N. S.) 702.

[5] *Ante*, § 56; Bagshaw *v.* The Eastern Union Railw., 7 Hare, 114. So may one or more shareholders file a bill, on behalf of themselves and others, against any officer who is diverting the funds of the company from their lawful use. Salomons *v.* Laing, 12 Beavan, 377; 6 Railw. C. 152; Edwards *v.* Shrewsbury & Bir. Railw., 2 De Gex & S. 537. See also Ill. Grand Trunk Railw. Co. *v.* Cook, 29 Ill. 237. And the directors of a company will be restrained by injunction from improper issue of shares. Fraser *v.* Whalley, 2 H. & M. 10.

[6] In the case of Brown *v.* Monmouthshire Railw., 13 Beav. 32; s. c. 4 Eng. L. & Eq. 113, Lord *Langdale*, M. R., after some rather spicy but highly pertinent strictures upon the prominent disposition of these public companies to take advantage of every possible evasion, seemingly to gain time, to the serious damage of their own character for frankness if not for fairness, upon the general merits of the bill, makes the following very prudent and comprehensive exposition of the general subject: "Having given my best attention to this case, and thinking it of very great importance and of some difficulty, I am, on the whole, of opinion that this bill cannot be sustained. The jurisdiction of this court has, in several cases, been very usefully applied in preventing or checking the erroneous conduct of corporations created by act of parliament for public purposes; but it is not settled to what extent, or subject to what particular limitations, the jurisdiction ought to be exercised; and unless parliament should think fit to lay down rules for the guidance of the courts, litigation to a considerable extent must, I am afraid, take place. The class of cases in which this court has often been called upon to interfere, are those which arise out of a combination of acts which are in themselves illegal, and considered as breaches of contract with the public, — acts which are breaches of contract, express or implied, with the subscribers to the undertaking, and acts erroneous, or breaches of contract incapable of being rectified by the shareholders themselves in the exercise of their own powers. In almost all cases it is necessary to distinguish two things, which, although they often are, and always ought to be, concurrent, are in themselves distinct, and are very apt to be confounded. There is the duty of the committee, directors,

* 5. In a case where the plaintiffs complained that the directors of the Victoria Park Company, and certain others,* proprietors of

or governing body, to the public, and their duty to the shareholders, whom they represent. In this case, the duty of the company to the public made it imperative upon them to complete their works in a limited time, and to let the works remain unfinished after the expiration of the time is a violation of their duty to the public, and a violation which, if permitted, would enable the company to do that which this court has repeatedly exercised its jurisdiction and power to prevent. If they are allowed to neglect the completion of their works until after the expiration of the time limited by the act, and are then allowed to make profit of so much as they have done, and to abandon the rest, it would seem that the means might at any time be found to abandon any part of their works at their own pleasure, and thus might extensive fraud be committed upon shareholders who had subscribed for the whole works. Such permitted violation of a duty to the public would show a most unfortunate state of the law, and be, in my opinion, a great injury to the public. But regarding this as a public wrong, or as a violation of duty to the public, it does not appear to me that this court has jurisdiction to interfere. The case does not appear to me to come within the authority of any decided case, or within the principle of the cases in which the court has interfered to prevent application of funds, subscribed for a whole purpose, to the completion of a part of it only; nor can it, I think, be safely said, that in no case whatever ought joint-stock companies to be allowed to divide any profits, or receive any tolls, until all their works have been completed. If parliament so enacted, it would probably be much better for the public, and also much better for the companies or shareholders themselves, but it is plain that the affairs of a company might be in such a state, with such probability of being at any time able to raise all the capital required for the completion of their works, that there would be no risk whatever in dividing some interim profits. But so far as the public interest is concerned, I do not think that this court has, on such a bill as this, jurisdiction to interfere. As to the duties which the governing body of such a company owe to their constituents, the shareholders, this court does not attempt to direct the performance of all such duties, but, on the contrary, leaves to the companies themselves the enforcement of all the duties arising out of matters which are the subject of internal arrangement. It seems very improper, and very imprudent, to treat as profit any part of their funds or income, at a time when they are without the pecuniary means of performing the works which they are bound to perform, in discharge of their duty to the public. The committee, with the sanction of the shareholders, are proceeding in a manner which (being attended with a constant breach of public duty) may result in the most serious injury to the shareholders themselves, in the same manner that any bad management injures those whose interests are affected by it; but they do it for themselves, and they must suffer the consequences. I think, therefore, that the demurrer for want of equity must be allowed. It appears to me that this court has not jurisdiction to interfere, on the mere ground that the defendants are acting in violation of their duty to the public, and that the misapplication of the income is a proper subject of internal regulation."

In Henry *v.* Great Northern Railw., 1 De G. & J. 606; s. c. 30 Law Times,

* 329, 330

shares, had entered into speculating purchases of the property of the company, and a majority of the directors being * bankrupts

10, it is held, that the holders of preference shares, as they are called in England, are entitled to have the company enjoined from declaring any dividend in favor of the ordinary shareholders, so long as the company remains liable to a deficit in their funds, caused by an officer of the company having defrauded them by forgeries. This case was affirmed in the Court of Chancery Appeal, 30 Law Times, 141. See also Gifford *v.* New Jersey Railw., 2 Stockton's Ch. 171. A minority of the stockholders of a corporation have a remedy in chancery against the directors, the corporation, and all others, individuals or corporations, to prevent a misapplication of the funds of the corporation in which they are interested. March *v.* Eastern Railw., 40 N. H. 548. Where, therefore, it was alleged in a bill that railroad A had leased and entered upon the track, furniture, fixtures, &c. of railroad B for a term of years, and had agreed to pay said railroad B, as rents at stated times, a certain share of the income and profits of both roads; and also that such profits to a large amount had been received by said railroad A, and had been accumulating for several years, said railroad A refusing to pay said rents according to the terms of said lease, and claiming to apply such profits in payment for investments by them made in the stock of other corporations, and in other schemes of speculation not warranted by the terms of said lease; and that said railroad B and its directors, being influenced by persons in the interest of said railroad A, had declined to take measures to collect said rents of said railroad A, but were allowing and consenting to such improper application of the funds belonging to them, to which funds the complainants, with the other stockholders, were proportionately entitled, as dividends upon their stock, it was held upon demurrer to this bill by railroad A, that a minority of the stockholders of railroad B might maintain suit against their own directors and their own corporation, and also against railroad A, the object of the suit being to prevent such misapplication of the funds, and to compel said railroad A to pay over its dues to railroad B, and to compel the latter to distribute the same as dividends among the complainants and others, its stockholders. But in order to prevent a multiplicity of suits, and that justice may be done between all parties interested, such stockholders should set forth in their bill that it is brought, not only for themselves, but in behalf of all others similarly interested, who may choose to become also plaintiffs in the proceeding. In the indentures whereby railroad B leased their road, &c., to railroad A, there was an agreement to refer to arbitration all disputes that might arise between them on the lease. *Held*, that this agreement not only did not oust the court of its jurisdiction, but that, under the circumstances, it might even enjoin both roads from making such reference in relation to the amount due to railroad B, and if such reference had been made, then from proceeding therewith. And even the fact that the contract was made and to be performed within a foreign jurisdiction would not hinder the court from acting, having jurisdiction of the parties. March *v.* Eastern Railw., 40 N. H. 548. In Nazro *v.* Merchant's Mutual Ins. Co., 14 Wisc. 295, it is laid down that the capital stock of an incorporated company is a trust fund, the proper application of which courts of equity will enforce by virtue of their inherent jurisdiction over trusts and frauds. See Lead Mining Co. *v.* Merryweather,

were not competent to exercise such office, and that the defendants were in various modes squandering the property of the company, and praying for the appointment of a receiver, and an injunction to compel the application of the company's resources to the extinguishment of its liabilities, and for the winding up of the affairs of the company, the Vice-Chancellor held, that upon the facts stated he must presume the existence of a board of direction *de facto*, and the possibility of convening a general meeting of proprietors capable of controlling the acts of the existing board, and that there therefore appeared no insuperable impediment in the way of the company obtaining redress in its corporate capacity for the acts complained of, and that therefore the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation.[7] In a later case before the

2 H. & M. 254; s. c. 10 Jur. (N. S.) 1231. But the suit should, in form, be in behalf of all the shareholders. March *v.* Eastern Railw., *supra*; White *v.* Carmarthen, &c. Railw., 1 H. & M. 786. But see Croskey *v.* Bank of Wales, 4 Giff. 314; s. c. 9 Jur. (N. S.) 595; Thomas *v.* Hobler, 8 Jur. (N. S.) 125. An illusory suit, really brought in the interest of a rival company, was held not maintainable in Forrest *v.* Manchester, Sh. & L. Railw., 30 Beav. 40, on appeal, 7 Jur. (N. S.) 887. And see Burt *v.* British Nation Life Ins. Co., 4 De G & J. 158; s. c. 25 L. J. Ch. 731, before the Lords Justices; Hutton *v.* Scarborough Cliff Hotel Co., 2 Drew. & Sm. 514.

Where a party had given money to the directors of a corporation in payment of shares, but had subsequently been struck off the list of shareholders, at his own request, on the ground that the scope of the company had been enlarged beyond that at first proposed, it was held he could not maintain a bill for the money either against the directors or the company, there being no fraud alleged; not against the company, because the money in their hands was not impressed with a trust; not against the directors, because the remedy against them was adequate at law. Stewart *v.* Austin, Law Rep. 3 Eq. 299.

[7] Foss *v.* Harbottle, 2 Hare, 461; Thames Haven Dock & Railw. Co. *v.* Hall, 6 Scott, N. R. 342, 359; s. c. 3 Railw. C. 441. This last is an action for calls, and the question of the existence of the company was attempted to be raised, after the case was set down for trial. It was held too late to raise such questions, and also that the validity of the authority of directors to make calls, as such, could not be raised in this mode; and that after plea, it will be presumed that the attorney, bringing the suit, was appointed under the seal of the company, and the court refused to allow a plea, raising these points, to be filed, at this late hour. See also Exeter & C. Railw. *v.* Buller, 5 Railw. C. 211, where it is said, that if the directors refuse to comply with a vote of a majority of the shareholders, a court of equity will compel them to do so, by injunction. But the allegation that shares were bought up, by interested parties, to change the vote, is nothing which a court of equity will consider. That is what every one may lawfully do, if he do not infringe the terms of the charter. Mozley *v.* Alston, 1 Phil. C. C. 790.

Lord Chancellor, *Cottenham*, the opinion of Vice-Chancellor *Wigram*, in Foss *v.* Harbottle, is fully confirmed, and it was conceded that it makes no difference whether the acts complained of as being transacted by the usurping board * of directors were absolutely void and illegal, or merely voidable at the election of the company. The Lord Chancellor said he had called for one case where a court of equity had assumed to try the validity of the election of corporate officers *de facto* exercising certain functions, and this at the suit of individual shareholders, where there appeared no impediment to the corporation seeking redress by mandamus, or any appropriate remedy, and as no such case had been produced he should assume that none existed, and he would not be the first to make such a case.[8]

[8] Mozley *v.* Alston, 1 Phillips, 790; Lord *v.* Copper Miners' Co., 2 Phillips, 740; Bailey *v.* Birkenhead, Lancashire, and Ch. J. Railw., 12 Beav. 433; s. c. 6 Railw. C. 256. In this last case it was held, that acts not set forth in the bill, although declared to be public acts, could not be referred to, in an argument on demurrer. It should be borne in mind, that the distinction attempted to be drawn, from some of the cases, between void acts of the directors and those which are merely voidable, is important chiefly in determining the discretion of the Chancellor, and is to be viewed in these cases, much as in other cases, where the authority of agents comes in question. Hodges on Railways, 71. And in Hichens *v.* Congreve, 4 Simons, 420, where certain persons agreed for the purchase of certain iron and coal mines for £10,000, formed a joint-stock Company for working them, and stipulated for the sale of the mines to the company for £25,000, the £15,000 to be divided among the projectors and their friends, who acted as officers of the company, which being acceded to by the company, and the money distributed accordingly, upon a bill brought by *some* of the shareholders, *on behalf of themselves and the others*, against the persons who had participated in the £15,000, the latter were decreed to refund what they had received, and one of them having become bankrupt, after he had paid the amount received by him into court, under an order upon motion, it was considered that the plaintiffs were entitled to receive that sum, and were not to be put to prove their demand under the commission. Upon the question, who are to receive the benefit of the restitution, the Vice-Chancellor said, "Those who now are, and those who by assignment from the present proprietors may become, members of the company."

Directors to whom the entire management of the company is intrusted, and who receive a remuneration for their services out of the funds of the company, are under an obligation to the shareholders at large to use their *best exertions in all matters which relate to the affairs of the company*. And without any stipulation to that effect, the duty results, *from the employment*, not to make *any profit* out of the employment beyond their compensation, and not to acquire any adverse interest, while they remain directors. Benson *v.* Heathorn, 1 Y. & Coll. C. C. 326; Great Luxembourg Railw. *v.* Magnay, 25 Beav. 586; s. c. 4 Jur. (N. S.) 839; Gaskell *v.* Chambers, 5 Jur. (N. S.) 52; s. c. 26 Beav. 360; Hodginson *v.*

* 6. But it seems to be well established, that the directors of a corporation are liable personally each for his own share in any loss occasioned to the company, for malversation, in the exercise of his functions, whether misfeasance, malfeasance, or non-feasance, the same as any other trustee, and redress may ordinarily be obtained in equity.[8] And it seems in such cases, as each director is liable only for his own act, and those to which he has assented, and there is no contribution among wrong-doers, there is no necessity that all the board should be parties to the bill, and

National Live Stock Ins. Co., 26 Beav. 473; s. c. 5 Jur. (N. S.) 478; s. c. on Appeal, 4 De G. & J. 422; 5 Jur. (N. S.) 969. See also Robinson *v.* Smith, 3 Paige, 222. So, too, a director is liable to account for premiums received upon the sale of shares. York and N. M. Railw. *v.* Hudson, 16 Beav. 495; s. c. 19 Eng. L. & Eq. 361. It was held in this case, that the directors could not discharge themselves from such a claim by suggesting that the money had been expended for secret purposes connected with the enterprise, and that persons in a fiduciary relation could not retain any remuneration for their services. But upon this last point see Hall *v.* Vermont & Mass. Railw., 28 Vt. 401. Where the stock of certain shareholders was about to be sold, and the officers of the company appointed an agent to buy it "for the use of the company," but when purchased they took a portion of it to themselves, it was held they were liable, in an action at law (in Pennsylvania), to any shareholder, for the damage thereby sustained by him. Kimmel *v.* Stoner, 18 Penn. St. 155; Attorney-General *v.* Wilson, 1 Craig & Phillips, 1. Redress in such cases is to be sought ordinarily, it would seem, in the name of the corporation. Society of Practical Knowledge *v.* Abbott, 2 Beavan, 559. But very extensive amendments in the frame of the bill, and even in the names of the parties, will be allowed. Jones *v.* Rose, 4 Hare, 52; Fellowes *v.* Deere, 3 Beav. 353; 7 id. 545; Tooker *v.* Oakley, 10 Paige, 288. Where the directors of a corporation pay over the funds in their hands, or in the treasury of the corporation, upon a pretended claim, which they must be presumed to know to be wholly unfounded, it is a breach of trust on their part, for which they are personally responsible, and one stockholder can maintain an action against them therefor, suing in his own name and in behalf of the other stockholders. Butts *v.* Wood, 38 Barb. 381. And see, as to the duties of directors and the degree of care required of them, Richards *v.* New Hampshire Ins. Co., 43 N. H. 263.

Officers of a corporation cannot purchase any claim against or interest in the company, except in trust for the company, after a resolution has been adopted by them, as managers, directing one of their number to purchase for the benefit of the company. A change of time and place from that published for the sale, where a resolution was passed directing the manager to purchase stock for the benefit of the company, is no revocation of the authority. In an action for conspiracy, proof of a division of the profits of the fraudulent concern, is sufficient evidence of combination in the first instance to render the declarations of one conspirator admissible in evidence against the rest. Ib.

although strictly the proceeding should be instituted in * the name of the company, many exceptions are allowed in this respect, as where the loss falls exclusively upon a portion of the shareholders, and where the majority are proceeding in violation of the fundamental law of such companies.[9]

7. And where the managing committee employed the funds of the company in buying up the shares in the market, it was held that the members of the committee were not properly charged with these sums in winding up the concern.[10] But the Vice-Chancellor said he entertained no doubt of its being a breach of trust, and that the parties, and all the parties, aiding or counselling it, when properly brought before the master, might be made liable.[10]

8. But a court of equity will not entertain a bill to compel a railway company to apply funds raised by the issue of new stock, according to the resolution by which the new stock was created by the directors of the company.[11]

9. It is a settled rule of equity law, that the minority of the shareholders in a joint-stock corporation may maintain a suit to restrain the directors of the company, or the majority of the shareholders, from entering into a stipulation whereby the business of the company is changed and directed into channels and enterprises wholly diverse from those originally contemplated and entered upon, and from which their emoluments had been derived.[12] But the court will not interfere to enjoin the majority

[9] Preston *v.* Grand Collier Dock Co., 2 Railw. C. 335; s. c. 11 Simons, 327; Walworth *v.* Holt, 4 My. & Cr. 619. Each shareholder has a distinct interest in dividends declared on stock, which cannot be represented by other shareholders, suing on behalf of themselves and the rest of the shareholders. Carlisle *v.* Southeastern Railw., 6 Railw. C. 670. See also the opinion of Lord *Cranworth*, V. C., Beman *v.* Rafford, 1 Sim. (N. S.) 550; s. c. 6 Eng. L. & Eq. 106; Hodges on Railways, 71.

[10] London & Birmingham, &c. Railw. *in re*, Carpenter *ex parte*, 5 De G. & S. 402; s. c. 13 Eng. L. & Eq. 201.

[11] Yetts *v.* Norfolk Railw., 5 Railw. C. 478; 3 De G. & S. 293; 13 Jur. 249.

[12] Kean *v.* Johnson, 1 Stockt. (N. J.) Ch. 401; *ante*, § 20; March *v.* Eastern Railw., 40 N. H. 548; Nazro *v.* Merchants' Mutual Ins. Co., 14 Wisc. 295. In the last case the question was affected by an act of the legislature authorizing the proposed change, and the decision turned in part upon the construction to be given to this act. And see Dyckman *v.* Valiente, 43 Barb. 131. And in State *v.* Bailey, 16 Ind. 46, it was held, that, where corporations are consolidated, with the consent of the legislature, those stockholders in the old who do not join the new are entitled to withdraw their shares, and may have an injunction

of the shareholders from applying surplus funds in the hands of the corporation to an extension of the business within its powers,

against the company until they are secured. See Port Clinton Railw. *v.* Cleveland & Toledo Railw., 13 Ohio St. 544. The rule of the text is applied to a church congregation in Winebrenner *v.* Colder, 43 Penn. St. 244. See German Ev. Con. *v.* Pressler, 14 La. Ann. 799; Charlton *v.* Newcastle, &c. Railw., 5 Jur. (N. S.) 1096; Knabe *v.* Ternot, 16 La. Ann. 13. But a minority of stockholders cannot restrain the company from doing what is plainly within the scope of their powers, on the ground that it will probably hinder the attainment of one of the objects of the company. Syers *v.* Brighton Brewery Co., 13 W. R. 220. And the plaintiff must be acting in good faith, not merely as a puppet in the hands of others. Filder *v.* London, Brighton, & South Coast Railw., 1 H. & M. 489; Forrest *v.* Man., Sh. & L. Railw., 30 Beav. 40; s. c. 7 Jur. (N. S.) 887.

But where the plaintiff, having lost money in speculating in the stocks of the company, bought five shares for the purpose of instituting a suit, in order to be bought off, it was held no ground for an application to the court for summarily striking the suit off the files of the court. Seaton *v.* Grant, Law Rep. 2 Ch. 459.

In Phœnix Life Insurance Company *in re*, *ex parte* Burgess & Stock, 9 Jur. (N. S.) 15, an extension of the business of a life-insurance company to marine insurances, made by a resolution of a specially convened meeting, and specified in a deed executed by some of the shareholders, and carried on without objection for a year and a half, was held not to bind the general body of the shareholders. But see Saxon Life Assurance Co. *in re*, *ex parte* Era Life & Fire Assurance Co., 1 De G., J. & Sm. 29. See also Maunsell *v.* Midland Great Western Railw., 1 H. & M. 130; s. c. 9 Jur. (N. S.) 660; Hattersley *v.* Shelburne, 7 L. T. (N. S.) 650; Great Western Railw. *v.* Metropolitan Railw., 9 Jur. (N. S.) 562; s. c. 32 L. J. Ch. 382. In the last-mentioned case, the Great Western Railway Company were authorized by act of Parliament to hold 17,500 shares in the Metropolitan Railroad Company. On an extension of the Metropolitan railway, additional shares were to be offered to the original shareholders; and the Great Western Company claimed its proportion of additional shares. Held, by *Wood*, V. C., that the company was not authorized to take, and could not claim any additional shares; by the Court of Appeal, that they might be authorized to take, though not to hold, the additional shares, and leave to amend given, as their bill did not show which they wished to do. Ib. And see Forrest *v.* Man., Sh. & L. Railw., 30 Beav. 40; s. c. on Appeal, 7 Jur. (N. S.) 887; Attorney-General *v.* Great Northern Railw., 1 Drew. & Sm. 154; South Wales Railw. *v.* Redmond, 9 W. R. 806; s. c. 4 L. T. (N. S.) 619; Hare *v.* London & N. W. Railw., 1 Johns. & H. 252; Sturges *v.* Knapp, 31 Vt. 1. In this case, those having the control of railways in Vermont were enabled by statute to lease them to companies owning other roads connecting with them at the line of the State. A railway having in this manner been leased to the Troy and Boston Railroad Company, it was held, that the want of authority in the Troy & Boston Railroad Company to take the lease could not be objected as long as the State of New York and those interested in that company had taken no measures to interfere with or avoid the lease.

There is a late English case bearing upon questions discussed in this note.

because a minority dissent from such extension.[13] So also the court will not enjoin the majority of the shareholders from extending the business of the corporation to kindred enterprises, beyond those contemplated in the charter, but sanctioned by express legislative grant and the vote of a majority of the shareholders.[14]

* 10. And because no individual stockholder can maintain any action against the directors for defrauding the company, as the directors are liable at law, only to the company for any misconduct equity will interfere at the suit of any stockholder, and sustain a bill at his suit against the directors for misconduct in * office, where the corporation is unable to bring a suit at law, or where, through collusion or fraud, it neglects to seek redress, and an application has been made to the directors for the use of the corporate name in the suit and that has been denied.[15]

A company having a line built and at work began an extension line, the capital to be raised as portions of the general capital, by the creation of new shares, the holders of which were not to have more than six per cent for the first three years. The directors charged to capital one-half of the office-expenses, and interest upon the debentures for the extension-line, and made a dividend to the extension shareholders from interest paid by the contractors in respect of the same being unfinished. A dividend was declared on the old stock on this basis. An interlocutory injunction was granted by *Wood*, V. C., on the application of one who had bought extension-stock for the purpose of filing his bill, on the ground that the above charges were wrong. On appeal, *Chelmsford*, Lord Chancellor, continued the injunction until the final hearing, on the ground that the questions were of importance and doubt; and if the dividend were paid it could not be recovered, which would be an irreparable injury to the extension stockholders. But as the balance carried over to the next year on the revenue account was much larger than the charge for expenses, if it was wrong, it was no ground for the injunction. *Semble*, that if the extension-line had been a separate undertaking, not as yet yielding income, the interest of a debt incurred to construct should have been charged upon the capital; but it being part of a general undertaking, yielding profit as a whole, *quære*, whether such debt should have been charged to capital or not. The dividend to extension shareholders was right; unless, as charged in the bill, the interest money was to be refunded to the contractors by the company. If the directors were acting *ultra vires*, it could not be set up that these were matters of internal management which the court would not disturb. The plaintiff having a real interest, and his stock being *bona fide* his own, he could maintain the bill in spite of the mode of his introduction into the company; so also in spite of these charges having been acquiesced in by former holders of the stock purchased by him. Bloxam *v.* Metropolitan Railw., Law Rep. 3 Ch. 337.

[13] Pratt *v.* Pratt, 33 Conn. 446.

[14] Durfee *v.* Old Colony & F. R. Railw., 5 Allen, 230.

[15] Allen *v.* Curtis, 26 Conn. 456. But the same must be brought without

11. Such a bill should be brought on behalf of the plaintiff and all other stockholders who elect to come in under the proceeding, and should make the corporation a party as well as the directors, and should allege the refusal of the corporation to proceed against the directors.[13]

12. The directors of a railway company are not responsible personally for property purchased on the credit of the company, or in its name and behalf, on the ground that it was purchased by them when the company had no available means to pay for it.[16]

13. It is the implied law of the association, that the business shall continue to the limit of the time fixed by the charter if it prove remunerative, and "it is the right of a partner to hold his associates to the specified purposes while the partnership continues."[12]

14. And where the directors of a bank refused to take the proper measures to resist the collection of a tax which they themselves believed to have been imposed upon them in violation of their charter, this refusal amounts to what is termed in law a breach of trust, and a stockholder may maintain a bill in equity against them, asking for such remedy as the case might require.[17]

15. And it would seem that the company might expend their funds, to a reasonable amount, in resisting proceedings in parliament, the tendency of which will be to injure the company.[18]

16. But a court of equity will not compel the directors of a corporation to declare dividends out of the surplus earnings of * the company, unless they are shown to have refused from a wilful abuse of their discretion.[19]

17. The directors are only liable for good faith and reasonable diligence.[19]

unreasonable delay, or the parties thus affected will lose their right to object to the irregularity. Peabody *v.* Flint, 6 Allen, 52.

[16] Rochester *v.* Barnes, 26 Barb. 657.

[17] Dodge *v.* Woolsey, 18 How. U. S. 331.

[18] Bright *v.* North, 2 Phill. 216, before *Cottenham*, Lord Chancellor. This was the case of the conservators of river banks, whose funds are raised by a rate upon the adjacent land-owners, and is stronger, perhaps, than that of a railway company. And the Lord Chancellor seemed to entertain so little doubt of the duty of the commissioners to expend money in opposing any grant in parliament which would injure the works under their care, that he did not call for argument in favor of the exercise of the right.

[19] Smith *v.* Prattville Man. Co. 29 Ala. 503.

* SECTION VIII.

Applications to Legislature for Enlarged Powers.

1. *Equity will not restrain railway companies from petition for enlarged powers.*
2. *The early English cases favored such applications.*
3. *The proper limitations stated.*
4. *Applications on public grounds not to be restrained; those on private grounds may be.*

§ 212. 1. In general, perhaps, courts of equity would not feel called upon to restrain the directors and agents of the company from applying to the legislature for an alteration or enlargement of their powers, for this is sometimes indispensable for the accomplishment of the objects of their creation, and very often highly desirable.[1] There are numerous instances in the books[2] of companies being enjoined from proceeding to certain works, until they did obtain such an enlargement of their powers. But it is not uncommon for a court of equity to restrain the company from applying their existing funds to such purpose.[3] And where the new scheme is in conflict with the interests of other railways, who, by leave of the legislature, own shares in the company applying for an extension of their line, or an enlargement of their powers, equity will not restrain them absolutely from procuring * the contemplated grant, but only from using their funds for that purpose; and will also prohibit one company from keeping its proceedings secret as to another company owning part of their stock, and will

[1] In Bill *v.* Sierra Nevada, &c. Co., 1 De G., F. & J. 177, it was held that an injunction will not be granted to restrain a corporation from applying for increased powers to the legislature of their own, or, if necessary, a foreign country. In Story *v.* Jersey City Railw., 1 C. E. Green, 13, the Court of Chancery refused to enjoin a railway company from applying to the legislature for enlarged powers, changing fundamentally its object, asking an abridgment of the political rights of the citizen.

[2] Frederick *v.* Coxwell, 3 Y. & J. 514.

[3] Stevens *v.* South Devon Railw., 13 Beav. 48; s. c. 2 Eng. Law & Eq. 138. In this case, and in Parker *v.* Dun Navigation Co., 1 De G. & S. 192, the company entered into a stipulation, that the objectors should be heard before the parliamentary committee, without which, it is said, in the English practice, before such committees, where the application is in the name and behalf of the company, shareholders objecting are not allowed to be heard. Where it was shown that the provisions of a bill would have the effect to reduce the income of a corporation, it was held that the corporation should not be restrained from opposing the bill before a committee of the House of Lords. Reg. *v.* Dublin, 9 L. T. (N. S.) 123.

generally enjoin the act of a majority of a joint-stock company, where the voice of the minority is not properly heard at the meeting, or is agreed to be disregarded by previous concert.[4]

2. The early cases upon this subject before Lord *Brougham*, as Chancellor, although in some respects more liberal in favor of allowing applications to parliament, seem to be more in accordance with the spirit of enterprise in this country than some of the recent English cases.[5]

3. The most which upon principle can be justified in this direction, is to restrain the company from applying their existing funds either to the obtaining of enlarged powers or to carrying them into effect. But the question of enlarging the powers of the company, or altering its fundamental law, is a matter resting altogether in the discretion of the legislature. But this, if accomplished, will not bind the existing shareholders, who have not assented to the alteration, but must be carried into effect by a new subscription probably, and this will subject the corporation to the embarassment of a double accountability, or the apportionment of loss and profits upon the several portions of the enterprise.[5]

4. In a late case of some interest, it was decided that applications to the legislature on public grounds could not be restrained by injunction, while those of a private nature might be so restrained in the discretion of courts of equity.[6]

[4] Great Western Railw. *v.* Rushout, 5 De G. & S. 290; s. c. 10 Eng. L. & Eq. 72. See also Const *v.* Harris, 1 Turner & Russell, 496, where Lord *Eldon* goes into an elaborate consideration of the rights of the minority of joint-stock companies, and what acts of the majority are binding upon the company. Attorney-General *v.* Norwich, 9 Eng. L. & Eq. 93; s. c. 21 L. J. Ch., 139.

[5] Hare *v.* The Grand Junction Water Works Co., 2 Russ. & Mylne, 470. And see Ward *v.* The Society of Attorneys, 1 Collyer, 370; Munt *v.* The Shrewsbury & Chester Railw., 13 Beav. 1; s. c. 3 Eng. L. & Eq. 144. See Cunliffe *v.* Manchester & Bolton Canal Co., 2 Russ. & Mylne, 480, in note; *ante*, § 56.

[6] Lancaster & Carlisle Railw. Co. *v.* N. W. Railw. Co., 2 Kay & J. 293.

*SECTION IX.

Specific Performance.

1. *Courts of equity will often hold control over railway contracts, referring the question of law to the courts of law.*
2. *But where the legal right is clear, equity will not interfere.*
3. *And where the affidavits are conflicting, court declined interfering.*
4. *So, too, where the company agreed to stop at a refreshment station.*
5. *So, also, if there is doubt of the legality of the contract, or its character.*
6. *A contract between different companies for the use of each other's track is permanent, and will be enforced in equity.*
7. *Will decree specific performance in regard to farm accommodations.*
8. *Specific performance affected by mistake of the parties. Subscription to stock will not be annulled because made through mistake, except upon prompt action.*

§ 213. 1. There can be no doubt courts of equity will, in proper cases, decree specific performance of contracts between different railways, or between natural persons and railway companies. But where the legal rights of the parties are doubtful, and no irreparable injury is to be apprehended, an action at law to try the legal question was ordered, and the business of the companies concerned was ordered to go on, the injunction of the Vice-Chancellor being dissolved by the Lord Chancellor for that purpose, and an account of passengers and other traffic upon the railway, in the mean time, ordered to be kept, to enable the Chancellor ultimately to adjust the question of damage according to the decision of the question at law.[1]

2. But it was said, in another case,[2] by the Lord Chancellor,

[1] The Shrewsbury & Birmingham Railw. *v.* The London & N. W. Railw. & The Shropshire Union Railw., 3 Mac. & G. 70; s. c. 1 Eng. L. & Eq. 122. The question in this case was, whether the defendants, according to a certain contract, claimed to exist between the companies, were at liberty to do business between certain points. It was claimed, among other things, that the contract was wholly void, as against public policy. Furness Railw. Co. *v.* Smith, 1 De G. & S. 299; *ante*, § 142. And see Munroe *v.* Wivenhoe, &c. Railw., 11 Jur. (N. S.) 612; s. c. 12 L. T. (N. S.) 655; Cardiff *v.* Cardiff Waterworks Co., 4 De G. & J. 596; Imperial Gas Light & Coke Co. *v.* Broadbent, 7 H. L. Cases, 600.

[2] Playfair *v.* Birmingham, Bristol, & Thames J. Railw., 1 Railw. C. 640. Courts of Equity will not decree specific performance of the contract of directors of a railway company, which is grossly improvident. 29 L. T. 186. Where a contract contains an express negative covenant, and complete justice can be done between the parties, the court will grant an injunction to prevent a breach of the negative covenant; but the court rarely interferes where there is no express negative stipulation, but the negative obligation is only to be inferred from a positive contract. Peto *v.* Brighton, &c. Railw., 1 H. & M. 468; s. c. 32 L. J. Ch. 677.

* reversing the decree of the Vice-Chancellor, that the court cannot upon an alleged equity interfere with an admitted legal right, unless there be a manifest certainty that at the hearing of the cause the plaintiff will be entitled to relief: That the title to relief in this case was not so clear as to justify the court in continuing the injunction, except upon the terms of the plaintiff giving judgment in the action and paying the amount sued for into court.

3. And in a case where the time for taking land under the company's act had expired, they having purchased land of A., and of B., and being about to enter upon the land to which they supposed they had purchased the title of B., A. claimed a life-estate in the same, and brought this bill to restrain the company from proceeding to appropriate it. The affidavits being conflicting, the court refused to interfere by injunction, but left the plaintiff to his remedy at law.[3]

4. So, too, the court refused to grant an injunction requiring the company to stop their train at a refreshment station, as the plaintiff claimed they had agreed to do, the company undertaking to pay such a sum of money as may be assessed as damages for the violation of the covenant, to be ascertained by the court.[4]

5. But where any doubt arises in regard to the legality of a * contract, or if it be not of a class where specific performance is usually decreed, the court will not interfere by injunction.[5]

[3] Webster *v.* The Southeastern Railw., 1 Sim. N. S. 272; s. c. 6 Railw. C. 698.

[4] Rigby *v.* The G. W. Railw., 1 Cooper's Cases, 6; s. c. 4 Railw. C. 491. In this case at law, 4 Railw. C. 190, it was held to be unnecessary to aver, that the trains passing the station in violation of the covenant contained passengers desirous of having refreshment, and who gave notice thereof. *Alderson*, B., said: "I think the meaning of the covenant is, that the parties have undertaken to stop the trains in order to the temptation, so to speak, to the passengers to take refreshment." 14 M. & W. 811. The covenant in this case contained an exception of trains "sent by express, or for especial purposes," and this was held not to include what are properly called "express trains." Hodges, 64. But in Sevin *v.* Deslandes, 7 Jur. (N. S.) 837, an injunction was granted to restrain an owner of a vessel from doing any act inconsistent with a charter-party into which he had entered. See de Mattos *v.* Gibson, 4 De G. & J. 276.

[5] Johnson *v.* Shrewsbury & B. Railw., 3 De G. M. & G. 914; s. c. 19 Eng. L. & Eq. 584. This is the case of a railway leasing their line and furniture to plaintiffs, and the bill prayed an injunction against the railway determining the contract, contrary to what they claimed to be its true construction. The court

6. A contract between two railways, that each shall run upon a portion of the other's line, is of a permanent character, and cannot be determined without the consent of both parties, although in terms it do not specify "successors," and if the line of one of the companies is leased to a third company, a court of equity will restrain the other party from interfering with the use of the line granted to the third company, or its lessees. A contract for such an easement need not be by deed.[6]

7. Courts of equity will decree specific performance of contracts by a railway company with a land-owner in regard to farm-crossings and such like works, upon the lands of the company, in which such party has an interest so material that the non-performance cannot be adequately compensated at law.[7]

8. Courts of equity will not decree specific performance of any contract where there has been a mistake of one or both the parties in regard to the import of the terms used in the contract. Nor will it reform a contract on the ground of mistake unless it clearly appear that both parties were agreed in the * terms, but the contract was so drawn as to express the mind of neither. But a court of equity will sometimes set aside and annul a contract on the ground of the innocent mistake of one party. But it must appear the plaintiff has not been in fault, and that no injustice will be

said, that, by the working of the line by other parties than the company, the public loses the benefit of the guaranty thereby afforded for care and attention. Such an agreement would seem to be illegal, as contrary to public policy. But if legal, the plaintiffs had ample remedy at law. Foster *v.* Birmingham & Dudley Railw., Weekly R. 1853, 1854, 378; Hodges, 680. In Port Clinton Railw. *v.* Cleveland & Toledo Railw., 13 Ohio N. S. 544, it was held, that if the court could in any case decree specific performance of a contract to operate a railway, requiring as it would personal acts and involving the exercise of skill and judgment under varying circumstances and emergencies, it could only be in a case where the demand for the exercise of the power was stringent, and the circumstances such as to authorize the court in making the order to limit the duration as to time, and to define, to some reasonable and proper extent, the manner in which it should be obeyed. Courts of equity will never decree specific performance where the party has not the power to perform the decree, but will leave the party to his remedy at law. Ellis *v.* Colman, 25 Beav. 662.

[6] Great Northern Railw. *v.* Manchester, Sheffield, & L. Railw., 5 De G. & S. 138; s. c. 10 Eng. L. & Eq. 11. But equity will not lend its aid, where the parties have put an end to the contract. Androscoggin & Kennebec Railw. *v.* Androscoggin Railw., 52 Me. 417.

[7] Storer *v.* Great Western Railw., 1 Yo. & Co., C. C., 180; s. c. 3 Railw. C. 106; *ante*, § 39.

done the other party.[8] Hence the subscriber to the stock of a railway can have no relief in a court of equity, on the ground that, while intending merely to renew an old subscription to the stock, which had fallen through, he by some unaccountable mistake subscribed for double the amount, but, although knowing his mistake at once, he gave the company no notice, and suffered them to act upon the faith of the subscription during several months.[8]

SECTION X.

Injunctions restraining one Company from interfering with exclusive Franchises of another.

1. *Equity exercises a preventive jurisdiction in such cases.*
2. *Will not interfere where the legal right is doubtful.*
3. *Unless to prevent irreparable injury, multiplicity of suits, or where legal remedy is inadequate.*
4. *Statement of facts and mode of procedure in such a case.*
5. *Injunction against different lines so connecting as to create competing line.*
6. *Many cases take similar view.*
7. *Railway not regarded as an infringement of the rights of a canal.*
8. *But will be restrained from filling up the canal.*
9. *Rights of railway companies if allowed to become proprietors of canals.*

§ 214. 1. The subject of the exclusive franchises of corporations will be considered elsewhere. But equity exercises a jurisdiction of a preventive character, by way of injunction, in regard to alleged infringements of such franchises, which is of a very important character. The general grounds of such interference are clearly and fully stated by *Wigram*, Vice-Chancellor, in the case of Cory *v.* The Yarmouth & Norwich Railway.[1]

[8] Diman *v.* Providence, Warr. & Br. Railw., 5 R. I. 130. A corporation must be described in a bill in equity as one established by law in some State, and doing business at some place. Win. Lake Co. *v.* Young, 40 N. H. 420.

[1] 3 Railw. C. 524; s. c. 3 Hare, 593. This was a case where the plaintiff, owning a ferry, obtained an act of parliament allowing him to build a bridge, and enacting that any persons who should evade the tolls by conveying passengers, &c. over the river otherwise than by the bridge, should subject themselves to a penalty of 40*s.* for each offence, to be recovered, in a summary way, before a justice of the peace. The defendants purchased of the plaintiff a piece of land for a terminus, within the limits of the ferry, and a clause was inserted in defendants' act, that they would not erect a bridge over the river without the plaintiff's consent, and that nothing therein contained should prejudice or affect the right of the plaintiff to the ferry, or bridge, or to the tolls. The railway

* 2. It is considered that this interference is solely in aid of the legal right, that if the legal right is free from doubt equity may assume to decide it, or to act definitely upon its acknowledged existence. If it is considered conjectural, and altogether problematical, equity ordinarily will not interfere until the legal right is established by the judgment of the appropriate legal tribunal.

3. But in their discretion courts of equity will interfere by injunction, during the pendency of the trial at law, to prevent irreparable injury, to avoid multiplicity of suits, and in some cases where there is given no adequate legal redress.[2] But where the injury is small and readily susceptible of estimation, equity will not generally interfere to the prejudice of the trial at law.

4. But in this case, where the only remedy given by the act was by recovering penalties *de die in diem*, in a summary way before a justice, which would not settle the right, the court directed an issue to be tried at law to settle the rights of the parties suggesting the outlines of the issue, the Master to direct the detail of the trial, and in the mean time directed the defendants to keep an account of all passengers and carriages, and all other things conveyed by them, and in respect of which the plaintiff would be entitled to any payment or toll if the same had passed over his bridge, and to furnish a copy of such account to the plaintiff before the trial, if requested.[3]

5. In a very elaborate case,[4] this subject is discussed * very much at length by an experienced and learned judge, and the conclusion arrived at, that, the plaintiffs' charter expressly providing that no other railway should be authorized by the legislature within thirty years, leading from Boston, Charlestown, or Cambridge, to Lowell, or to any point within five miles of the northern terminus of plaintiffs' road, it was not competent for the defendant companies so to connect their roads as to make a continuous line from Boston to Lowell, by Salem and Lawrence, even if it were conceded

company dug a canal to the river, and by means of a steamboat conveyed their passengers from their terminus to a point in Yarmouth upon the opposite shore, much below the plaintiff's bridge. The form for an order, for a trial at law in such cases, will be found in the report of this case.

[2] See Hepburn *v.* Lesdan, 2 H. & M. 345; s. c. on appeal, 11 Jur. N. S. 254.

[3] Cory *v.* Yarmouth & Norwich Railw., *supra*.

[4] Boston & Lowell Railw. *v.* Salem & Lowell and other Railways, 2 Gray, 1. See *post*, § 231, where the substance of the opinion of the court upon the constitutional question is given.

* 343, 344

that the legislature might by express grant have created a rival road from Boston to Lowell, infringing the terms of the plaintiffs' grant. And inasmuch as the defendants had so conducted their business as virtually to create a rival line from Boston to Lowell, in contravention of the express terms of the plaintiffs' grant, without the express permission of the legislature, it did constitute such an infringement of plaintiffs' charter as to be a nuisance to their rights, for which they are entitled to a remedy. And the court accordingly granted a perpetual injunction against the infringement of plaintiffs' rights in the manner complained of.

6. There are many other cases, taking substantially the same view of the propriety of equitable interference to protect corporations against infringements of their corporate franchises.[5]

* 7. And it has been held, that a grant to a canal company, to collect tolls for transportation, with an express stipulation against their being reduced by the act of the legislature, is not impaired by the grant of a railway along the same route, with power to take the lands of the canal for its construction when necessary.[6]

8. An injunction was granted, at the suit of the state, to restrain

[5] Newburgh & Cochecton Turnpike Co. *v.* Miller, 5 Johns. Ch. 101, 111; Ogden *v.* Gibbons, 4 id. 150; 160; Croton Turnpike Co. *v.* Ryder, 1 Johns. Ch. 611. A railway bridge is an interference with the charter franchise of a toll-bridge, for a turnpike or highway. Enfield Toll-Bridge Co. *v.* Hartford & New H. Railw., 17 Conn. 40. And in s. c. 17 Conn. 454, it is considered, that the condition in the plaintiffs' charter, that no person shall erect another bridge within the limits of Enfield and Windsor, is a part of their franchise, and not a distinct covenant. But where the charter of the toll-bridge contained no exclusive grant and no limitation, in regard to the power of future legislatures to erect other similar bridges, it was held they had no exclusive franchise, and that an injunction would not be granted against another company, chartered by the legislature, within such distance as to lessen the tolls of the first company. Mohawk Bridge Co. *v.* The Utica & Schenectady Railw., 6 Paige, 554. And in Bridge Proprietors *v.* Hoboken Co., 1 Wallace, U. S. 116, the national tribunal of last resort held, that even where the charter of a toll-bridge does contain such exclusive grant, a railway bridge, adapted only for railway communication, is not an infringement of such grant. *Post*, § 231. This was the case of a railway, indeed, which is not so obviously an evasion of the rights and interests of the toll-bridge company, as a company precisely similar, but even that is no infringement, unless the charter of the first company contained an exclusive grant. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Dyer *v.* The Tuscaloosa Bridge Co., 2 Porter, 296. See also Thompson *v.* The N. Y. & Harlem Railw., 3 Sandf. Ch. 625; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547.

[6] Illinois & Mich. Canal *v.* Chicago & Rock Island Railw., 14 Ill. 314.

a railway company from filling up a part of the state canal, and erecting an arch over it, which would obstruct its use, although it appeared that this portion of the canal had laid in a state of abandonment for many years.[7]

9. But where a railway company, by act of the legislature, are allowed to purchase a canal, and are bound to maintain and keep it open for traffic, and are to exercise all the rights, powers, and privileges which the canal company might have done before the sale, it was held that the railway company might take the lease of another canal, under the general statute.[8] It is doubtful whether, if such act were *ultra vires*, the nominee of another company can bring a bill to restrain the act.[9]

* SECTION XI.

Injunctions against the Infringement of Corporate Franchises in the Nature of Nuisance.

1. *Allowed to prevent multiplicity of suits, collisions, and riots.*
2. *Lord* Brougham's *definition of the jurisdiction.*
3. *Definition of same by Chief Justice* Shaw.
4. *Statement of the general grounds of equitable interference.*
5. *Court will sometimes enjoin a mere trespass, where the damage is irreparable and without color of right.*

§ 215. 1. The cases coming under the general denomination of injunctions, to restrain nuisances to corporate franchises, are very numerous and various, too much so, by far, to be here enumerated. It is a branch of equity jurisdiction of ancient date, and which in modern times has been very extensively resorted to by the

[7] Commonwealth *v.* Pittsburgh & Connellsville Railw., 24 Penn. St. 159.

[8] 8 & 9 Vict. ch. 42; Rogers *v.* Oxford, W. & W. Railw. Co., 2 De Gex & Jones, 662.

[9] Rogers *v.* Oxford & C. Railw. Co., *supra*. In this case, the bill was brought by the clerk of a rival canal company, by purchasing a few shares of the railway stock to enable him to maintain the bill in his own name, but on behalf of the other stockholders as well, but in fact, for the benefit of the rival company. This is a not uncommon shift, in controversies of this character, and it is in our humble judgment a disgraceful evasion, which a court of equity ought not to countenance. If the stockholders of the company acquiesce, mere intermeddlers ought not to be allowed to interfere. This is the opinion frequently intimated in the English courts, and it is the only ground of doubt in regard to the case of Stevens *v.* Rut. & Bur. Railw., 1 Am. Law Reg. (1853), 154; *ante*, § 56.

equity courts, in order to prevent irreparable damage, in various modes, as by multiplicity of suits, by collisions in the nature of riots, among the numerous champions of rival public enterprises, and for many other reasons, recommending this mode of redress especially to public favor.[1]

2. The grounds of equitable interference, in case of nuisance, are well stated by Lord *Brougham*, in the Earl of Ripon *v.* Hobart.[2] "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial, and will, according to the circumstances, direct an issue, or allow an action, and if need be expedite the proceedings, the injunction being in the mean time continued." But, says his lordship in substance, where the thing is only liable to prove such, according to * circumstances, the court will not interfere until the matter has been tried at law. And the same general doctrine is maintained in other cases upon this subject.[3]

3. In the case of Boston and Lowell Railway *v.* Salem and Lowell Railway *et al.*,[4] Chief Justice *Shaw* thus lays down the law upon the subject: — "An injunction will generally be granted to secure a statute privilege, of which a party is in actual possession, unless the right be doubtful."[4]

4. The equitable interference, by injunction, goes upon the ground that the defendant's acts constitute a nuisance, and that the plaintiff sustains special damage thereby, and that the law affords no specific and adequate remedy. Hence it is not competent for one who suffers damage, in common with others only, to maintain

[1] Attorney-General *v.* Sheffield Gas Co., 3 De G. M. & G. 304; s. c. 19 Eng. L. & Eq. 639. This is a case where the injunction is denied upon the ground of the trivial character of the nuisance or damage, but the general grounds of the jurisdiction of courts of equity in such cases, being necessarily involved in the inquiry, are fully and ably discussed, by *Turner* and *Bruce*, Lords Justices, in giving their opinions. See also the opinion of Lord *Eldon*, in Attorney-General *v.* Nichol, 16 Vesey, 338, upon the same general subject. The court will not interfere by injunction to prevent a nuisance caused by carrying on a trade which is temporary and occasional only. Swaine *v.* Great Northern Railw., 10 Jur. N. S. 191.

[2] 3 Mylne & Keen, 169.

[3] North Union Railw. *v.* Bolton and Preston Railw., 3 Railw. C. 345; Semple *v.* London and B. Railw., 9 Sim. 209; s. c. 1 Railw. C. 120.

[4] 2 Gray, 1. See also upon this point, *ante*, § 214, n. 5. Livingston and Fulton *v.* Van Ingen and others, 9 Johns. 507; Ogden *v.* Gibbons, 4 Johns. Ch. 174; Osborn *v.* Bank of U. States, 9 Wheat. 738, 841.

a bill to enjoin a party from the continuance of a public nuisance, under color of legislative grant.[5]

5. And the court will enjoin one railway from placing an obstruction partly in the highway, and partly on the land of another railway so as to obstruct the passage to the station of the latter company; the injury being conceded to be in its nature irreparable and done without color of title.[6]

SECTION XII.

Injunctions to preserve Property pendente lite.

1. *Will not decree specific performance, where mere question of damages.*
2. *Where injunction might operate harshly, parties put under terms.*

n. 2. *Review of cases upon this subject.*

§ 216. 1. There are some cases where courts of equity have interfered, by injunction, in controversies between different railways, to preserve the property pending the litigation. But in a case where one railway company had leased its line and furniture to another company, and this company proposed to disregard the contract on the ground of its illegality, and were about * entering into an arrangement with another company, which would be in violation of the first contract, the court declined to interfere, by injunction, as it was not clear that the first contract was valid, or that the loss to the second company, in not entering into their proposed arrangement with the third company, might not be greater than their loss from violating the first contract.[1]

[5] Bigelow *v.* Hartford Bridge Co., 14 Conn. 565; O'Brien *v.* Norwich and Worcester Railw., 17 Conn. 372; Delaware and Maryland Railw. *v.* Stump, 8 Gill & J. 479.

[6] London & Northwestern Railw. *v.* Lancashire & Yorkshire Railw., Law Rep. 4 Eq. 174.

[1] Shrewsbury and Chester Railw. *v.* The Shrewsbury and B. Railw., 4 Eng. L. & Eq. 171; s. c. 1 Simons (N. S.), 410. See also Spiller *v.* Spiller, 3 Swanst. 556; The Great W. Railw. *v.* The Bir. and Oxford J. Railw., 2 Phillips, 597; Farrow *v.* Vansittart, 1 Railw. C. 602. The question in this case was, whether a reservation, in the lease of land, of the minerals, and the right to remove them, implied the right to erect a public railway, and the Lord Chancellor continued the injunction, to preserve the property, during the pendency of the necessary trial at law. But by a late English statute, 15 & 16 Vict. ch. 86, § 61, courts of equity are authorized, in cases where they deem a trial at law

2. In the English equity practice, in some cases, in consideration of the consequent delay and inconvenience resulting from injunctions, the courts have put the parties under terms to obey the orders of court, and in default of complying with such orders, the injunction to issue. This is done so as to effect substantial justice to one party, without imposing unnecessary hardship upon the other.[2]

*SECTION XIII.

Injunctions restraining Parties from petitioning Legislature.

1. *Right claimed to exist, but rarely exercised, by courts of equity.*
2. *Not sufficient that it will interfere with rights of other parties.*
3. *Where right doubtful may be sent to court of law for determination.*

§ 217. 1. The jurisdiction of courts of equity to restrain parties from petitioning parliament in fraud of their own contracts, seems to have been assumed to exist in numerous cases, but its exercise is rare, and with marked circumspection.[1] In a late

unnecessary, to determine the question themselves. Under this statute the equity courts often avail themselves, as by the 14 & 15 Vict. ch. 83, § 8, they are allowed to do, of the assistance of one of the common-law judges. And it is held that the court will still, in a proper case, give leave to the party to bring an action at law. Hodges, 676; *ante*, § 213.

[2] Northam Bridge and Roads *v.* The London and Southampton Railw., 11 Sim. 42; s. c. 1 Railw. C. 653. This is a case where the plaintiff prayed for an injunction upon defendants from crossing their road, except by means of a bridge. The question of right being sent to the Court of Exchequer, and determined in favor of plaintiffs, the Chancellor, upon the defendants undertaking to build the bridge with all possible despatch, held, that an injunction ought not to be granted during the time that must necessarily elapse in building the bridge.

See also Spencer *v.* London and B. Railw., 1 Railw. C. 159; Jones *v.* Great Western Railw., 1 Railw. C. 684; London and Birm. Railw. *v.* The Grand Junc. Canal Co., id. 224; Attorney-General *v.* The Eastern Counties Railw., 7 Jur. 806; s. c. 3 Railw. C. 337; Langford *v.* The Brighton L. & H. Railw., 4 Railw. C. 69. This was a controversy in regard to the payment of the price of land, which was in dispute between the parties. The bill prayed, that the defendants be restrained from going forward with their works until they shall have paid the amount demanded. The court held, they would not interfere by injunction to stop the works, if perfect justice can be done by compelling the company to pay for the land, but will order the proximate value to be deposited, until the amount be determined.

[1] The Stockton & Hartlepool Railw. *v.* Leeds & Th. & Clarence Railws., 2

case [2] the Lord Chancellor *Cottenham* said: "In a proper case I should not hesitate to exercise the jurisdiction of this court, by injunction, touching proceedings in parliament for a private bill, or a bill respecting property, but what would be a proper case for that purpose it may be very difficult to conceive."

2. But it was here distinctly held, that it is not enough to justify such an interference that the object of the application was to interfere with some right or interest of some other party.[3] For every act of the legislature which is promoted by private parties, is intended, more or less, to affect private interests of other parties. As, for instance, a railway very essentially effects the interests of those land-owners through whose lands it passes, and a private interest resulting from ownership of property is as sacred * as that which rests upon contract. But no one would suppose that because the company had obtained an act, or even given notice of taking land, that a court of equity would, at the suit of the land-owners, enjoin the company from applying to parliament to be released from their undertaking. This would still leave them liable to the land-owners, the same as before. Such is the substance of the opinion of the learned Chancellor in the last case cited.

3. In a case where the construction of the act of parliament was doubtful, the question was sent to a court of law, the injunction being continued in the mean time under such modification as to enable the defendants to perform a condition precedent in their contract with land-owners; and it was said that mere inconvenience could not be viewed in the light of injury, and that companies have a right to carry on their railway according to the plan laid down in their act, although a junction contemplated in procuring the act may be frustrated by the abandonment of the line.[4]

Phill. 666. In this case Lord *Cottenham*, Chancellor, says: "There is no question whatever about the jurisdiction. This is the case of a petition against the Clarence company obtaining an act, enlarging their powers, and authorizing the amalgamation of the four companies, upon the ground that the plaintiffs having come into the arrangement, it was a fraud in them to oppose the act by which it was to be effected. But the court refused the injunction, upon the ground that the contract was merely inchoate."

[2] Heathcote *v.* The North Staffordshire Railw., 2 Mac. & G. 100; s. c. 2 Hall & T. 382; 6 Railw. C. 358.

[3] And the same doctrine is maintained in the later case of Bill *v.* Sierra Nevada, &c. Co., 1 De G. F. & J. 177.

[4] Clarence Railw. *v.* The Great N. of England, Clarence, & Hartlepool Railw.,

SECTION XIV.

Interference of Courts of Equity in the Sale and Disposition of the effects of Insolvent Companies.

1. *Will interfere to save costs and litigation.*
2. *All parties interested may come in.*
3. *Summary proceeding in some states.*

§ 218. 1. Where there are sundry *fi. fas.* against a railway company which is insolvent, and it is threatened to levy upon and sell the road with its equipments, equity will take jurisdiction, direct a sale for all concerned, and distribute the funds to such as shall show themselves entitled, according to the usual course of the courts of equity in marshalling assets.[1]

* 2. In such a proceeding any one who has a claim upon the fund, but who is not a party to the suit, may become a party by presenting his claim before the Master, or under the decree, before it becomes final.[1] But if he neglects to do so, equity will not aid him in setting it aside.[1] Equity will not relieve against a judgment recovered through the negligence of the defendant.[2]

3. The courts of equity, in some of the states, have interfered in a very summary manner to set aside conveyances to corporations which have forfeited their corporate rights and existence by irregularity or defect in their proceedings. But in general a corporation must be regularly adjudged to have forfeited its corporate existence before any court will enter upon a collateral inquiry into the facts upon which such claim is made.[3]

6 Jur. 269; s. c. 2 Railw. C. 763. See also Attorney-General *v.* Manchester & Leeds Railw., 1 Railw. C. 436.

[1] Macon & Western Railw. *v.* Parker, 9 Georgia, 377. A query is here suggested, whether the railway bed and superstructure are liable to the levy of the execution. At all events they cannot be sold in fragments, or distinct portions, upon an execution.

[2] Bruner *v.* Planters' Bank, 23 Miss. 406.

[3] Casey *v.* Cin. & Chi. R. Co., 5 Clarke, 357.

SECTION XV.

Manner of granting and enforcing ex parte Injunctions.

1. *Such injunctions especially liable to abuse.*
2. *In important cases not allowed, except upon notice to other party.*
3. *Injunction commonly dissolved, upon answer, denying equity.*
4. *Remarks of Lord* Cottenham *upon this subject.*
5. *Party who obtains such injunction, on imperfect state of facts, liable to costs.*

§ 219. 1. The general mode of obtaining *ex parte* injunctions is sufficiently understood to be by bill, verified by the oath of the party, and accompanying affidavits. This gives very great advantages always to unscrupulous suitors; and in a country where chancery practice is not a distinct department of the profession, so as to create always the highest standard of professional delicacy, and where it is too much the course of public opinion to justify any degree of professional subserviency, to serve the purpose of clients, there are few instruments in the range of legal proceedings more susceptible of irreparable abuse than an *ex parte* injunction out of chancery.

2. Hence in modern times, when they are sought for the purpose of staying the operations of great public enterprises, either * in construction or operation, it has been more usual not to allow them, except upon notice to the defendant, and on opportunity to produce affidavits in exculpation.[1]

3. The injunction is always dissolved upon the defendant's answer, filed gratis,[2] denying the equity of the bill, unless for

[1] See Del. & Rar. Canal & C. & A. Railw. *v.* Rar. & Del. Bay Railw., 1 McCarter, 445. The court in this case denied a motion for a temporary injunction, as being a violation of the spirit of the rule which forbids the issuing of an injunction to restrain the construction of a public work, authorized by a law of the state, until after a hearing upon a rule to show cause. And in a recent case in New Jersey, the court say that when public interests, or the rights of large classes are involved, an injunction will not be granted except upon hearing and notice, and then only when it appears that the injunction will not prejudice some public or *quasi* public interest. Society for Establishing Useful Manufactures *v.* Butler, 1 Beasley, 498. See also Attorney-General *v.* Charles, 11 W. R. 253.

[2] The Attorney-General *v.* The Mayor of Liverpool, 1 Mylne & C. 171. But where the dispute is not about facts, but is a mere question of legal construction, as the proper interpretation of a grant of mining rights, a simple denial of the

special reasons the court, on affidavits upon both sides, sees fit to order its continuance, either absolutely or upon terms.[3]

4. The remarks of Lord Chancellor *Cottenham* are fit to be here inserted, perhaps: "A very wholesome rule has been established in this court; that if a party comes for an *ex parte* injunction, and misrepresents the facts of the case, he shall not then be permitted to support the injunction by showing another state of circumstances, in which he would be entitled to it; because the jurisdiction of the court in granting *ex parte* injunctions is obviously a very hazardous one, and one which, though often used to preserve property, may be often used to the injury of others; and it is right that a strict hand should be held over those who come with such applications. The objection here taken is not that the facts were not stated, but that the whole law was not stated; that is to say, that the attention of the court could not have been called to certain provisions of the act, which would have presented a different view of the case in the mind of the judge. If fault is to be found with any one, it is, I am afraid, with the court, which is bound to know every clause in every act ever passed, — a degree of knowledge hardly to be hoped for. *I never heard the rule carried to this extent, that the party applying is bound to lay the whole law before the court. I do not find that any misstatement or omission of any important facts was made on the present application; nor am I at all aware, if the whole law of the case, as far as it can be collected from the act of parliament, had been brought under my view, that upon the statement in the affidavit that the defendants were immediately proceeding to act, I should have thought this a case in which it was expedient to permit the defendants to go on until an opportunity was given to have the matter fully heard and discussed. I have nothing to do with any feelings which may be excited in Liverpool on the subject; the court can only look to the question as a matter of property, and as a matter of property this is the most innocent injunction that could possibly be granted, as indeed is proved by the fact that the defendants have waited fourteen days before they applied to dissolve it. They will still have ample time to carry into effect the plan which they have adopted, and which they have adopted from very good motives. Whether

equity of the bill will not as of course entitle the defendants to a dissolution of the injunction. Boston Franklinite Co. *v.* New Jersey Zinc Co., 2 Beasley, 215.

[3] Warburton *v.* The London & Blackwall Railw., 1 Railw. C. 558.

they have a right to carry it into effect it is not now my intention to determine; my object being to let things remain as they are until this important question can be regularly brought on for solemn argument and decision.

"In many cases the court feels, that by granting an injunction *ex parte*, it may be doing an act of extreme injustice. The party against whom such an injunction is granted may possibly be exposed to very great injury by the order being enforced; but when, as here, the injunction is to prevent an alteration in the state of property, to prevent the corporation seal from being put to securities, until an opportunity is afforded of having the matter fully discussed, it is not in point of property an injunction which can occasion any mischief whatever."

In another case[4] the same learned judge puts forth some very pertinent strictures upon the bad taste and bad morals of litigation in courts of equity, upon grounds quite one side of the merits of the real controversy and matter in dispute: "It is very necessary that this court should deal very strictly with companies, and prevent them, with the large powers that are given to them by acts of parliament from defeating the rights and interests of individuals. * But it is the duty of the court to take care that, if individuals avail themselves of any omission of any power on the part of the company, this court should not assist those individuals in extorting money from the company. It is the duty of the court in every case to steer clear of these two opposite extremes; and if there should be some omission which may give a party a legal right against a company, the court would leave that individual to his legal means of taking advantage of it."

5. Where an *ex parte* injunction is granted, upon a state of facts not fully disclosing the case, and is subsequently dissolved, upon a further development of the real facts on the part of the defendant, it should generally be done with costs to defendant.[5]

And if the party obtains an *ex parte* injunction upon one state

[4] Bell *v.* The Hull & Selby Railw., 1 Railw. C. 636.

[5] Illingworth *v.* Manchester & Leeds Railw., 2 Railw. C. 187. Upon this point the Chancellor says: "Is the evil which has arisen from the injunction having been made, and the expense of having it discharged, to be attributed to the error of the court, or to the false representation of the case by the plaintiffs? Certainly the latter. The costs were therefore properly given to the defendants." Semple *v.* London & Birmingham Railw., 1 Railw. C. 480, 493; s. c. 9 Sim. 209.

of facts, which turn out upon trial not to be true, or not to be the fair state of the full case, he cannot fall back upon another state of facts which is established, and which would also entitle him to an injunction. But sometimes in such cases the injunction is discharged without costs.[6]

*SECTION XVI.

Right to interfere by Injunction lost by Acquiescence.

1. *Acquiescence to extinguish right must have operated upon other parties.*
2. *Delay, to learn the extent of injury, will not estop the party.*
3. *Acquiescence has been held not always perfectly to express the idea.*
4. *How far injunctions granted against cities and towns.*

§ 220. 1. The right to interfere by injunction is one that should always be asserted, on fresh suit, or it will be regarded as voluntarily waived, and lost by acquiescence.[1] But if the acquiescence is explainable upon other grounds than that of waiver of right, and can be clearly seen not to have, in any sense, invited or confirmed the conduct of the other party, it will not conclude the right to interfere in this mode.[1]

[6] Greenhalgh *v.* M. & Birmingham Railw., 1 Railw. C. 68; s. c. 3 My. & Cr. 784; Attorney-General *v.* The Mayor of Liverpool, 1 My. & Cr. 171, 210.

[1] *Ante*, § 198; Illingworth *v.* The Manchester & Leeds Railw., 2 Railw. C. 187; Semple *v.* The London & Birmingham Railw., 9 Sim. 209; s. c. 1 id. 120; Greenhalgh *v.* The Manchester & B. Railw., 1 id. 68; 3 My. & Cr. 784; The Birmingham Canal Co. *v.* Lloyd, 18 Vesey, 515; Wintle *v.* Bristol & South Wales Union Railw., 10 W. R. 210; Ware *v.* Regent's Canal Co., 3 De G. & J. 212; Imperial Gas Light & Coke Co. *v.* Broadbent, 7 H. L. Cases, 600; Anglo-Californian Gold Mining Company *in re*, *ex parte* Baldy and Wormald, 10 W. R. 309; s. c. 6 L. T. N. S. 340; Gregory *v.* Patchett, 33 Beav. 595; s. c. 10 Jur. N. S. 1118. Attorney-General *v.* The Manchester & Leeds Railw., 1 Railw. C. 436. A delay of three weeks after information of proposed buildings, without any inquiries about the place proposed, was held to disentitle plaintiffs to an injunction on the ground of obstruction to their light and air. Johnson *v.* Wyatt, 11 W. R. 852. See also Great N. Railw. *v.* Lancashire & Yorkshire Railw., 1 Sm. & Gif. 81; *ante*, § 62. In Pentney *v.* Commissioners, 13 W. R. 983, it was held that a claim for compensation for an illegal and enjoinable act, made in ignorance of its illegality, was no bar to an application for an injunction made as soon as the claimant had learned his rights. And though the plaintiff's acquiescence may have disentitled him to an injunction against the defendant, it does not follow that equity will restrain him from suing for damages at law. Bankart *v.* Houghton, 27 Beav. 425. Where a

* 2. Mr. Hodges says upon this subject, not inappropriately altogether, it is to be feared: "To a very considerable extent each case will be governed by its own particular circumstances; and it has been said on this subject, that there are two arguments invariably adduced by public companies. If the plaintiff comes to the court complaining of an injury, at the first commencement, it is said, that the damage is trifling, and the motion is trifling and vexatious; if he waits till it has assumed a graver shape, it is then said that he has acquiesced, and is therefore precluded from complaining." [2]

3. The kind of acquiescence which will conclude a party, has been defined by eminent equity judges as being something not well expressed by that term.[3] "Now acquiescence is not the term which ought to be used. If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence."

resolution was passed by the shareholders of a company, authorizing acts to be done which were partly within and partly without the scope of their powers, such acts being capable of being carried out singly, it was held that a shareholder was not bound to apply for an injunction to restrain the company from exceeding their powers until he became aware that an attempt was being made to carry out the illegal portion of the resolution. Charlton *v.* Newcastle, &c. Railw., 5 Jur. N. S. 1096.

[2] Great Western Railw. *v.* Oxford, Worcester, & Wolverhampton Railw., 3 De G. Mac. & Gord. 341; 10 Eng. L. & Eq. 297; Ffooks *v.* London & S. W. Railw., 1 Sm. & G. 142; s. c. 19 Eng. L. & Eq. 7; Innocent *v.* The North Midland Canal Co., 1 Railw. C. 250; cases cited n. 1, Am. ed.; Mott *v.* Blackwall Railw., 2 Phill. 632; Graham *v.* Birkenhead Junction Railw., 2 Mac. & G. 160; Bankart *v.* Houghton, 27 Beav. 425. In the last mentioned case it was laid down that where the occupier of land has acquiesced in the erection of works upon adjoining land which appear not to be and are not, in fact, injurious, there is no implied acquiescence in the natural extension of those works in the ordinary course of operations.

[3] Lord *Cottenham*, Chancellor, in Duke of Leeds *v.* Earl of Amherst, 2 Phill. Ch. Cases, 117, 123; Lee *v.* Porter, 5 Johns. Ch. 268, 272; Perine *v.* Dunn, 3 Johns. Ch. 508; Lee *v.* Munroe, 7 Cranch, 366; opinion of *Coalter*, J., Taylor *v.* Cole, 4 Munford, 351. Hentz *v.* The Long Island Railw. Co., 13 Barb. 647, was where a party, whose land had been taken by a railway company, might have insisted on compensation being paid, at the time, but neglected to do so, and forbore to assert his right until after the road was completed and in full operation, and when an interruption of its business would be seriously injurious, and it was

4. Where the extension of a railway is a nuisance, it should be enjoined.[4] To obtain an injunction against the municipal authorities on the ground of the execution of public ordinances * made by them allowing railway companies to occupy the streets by their tracks, it should appear that such acts are about to be executed, and that they will produce an obstruction in the streets, and that the railway company in executing the ordinance act as the agents of the municipal authorities.[5]

SECTION XVII.

Mandatory Injunctions sometimes allowed.

1. *Injunctions may produce mandatory effect, but must be specific.*
2. *A decree for specific performance is a mandatory injunction.*
3. *Injunction not granted to transfer litigation to another forum.*
4. *Mandatory injunctions granted only where any serious injury would else accrue.*
5. *The fact that the act is done, no ground to refuse injunction.*

§ 221. 1. It has been held, that it is no objection to an injunction that it was in effect of a mandatory character.[1]

But all injunctions should be specific and intelligible ; and it is well said, in regard to an injunction restraining the company from taking and using any more of the plaintiff's land than is necessary for the purpose of making and maintaining the railway and works, authorized by the act, by Lord Chancellor *Cottenham :* —

" I do not believe the Vice-Chancellor intended that the injunction should be in this form, when he decided the question ; and this appears to be a very objectionable form of order."

It is there held, that the injunction should be so expressed as to

held that an injunction should not be granted until all the ordinary means for obtaining an indemnity had failed.

[4] People *v.* Third Avenue Railw. Co., 45 Barb. 63.

[5] People *v.* New York & Harlem Railw. Co., id. 73.

[1] Great North of England, Clarence. & Hartlepool J. Railw. *v.* The Clarence Railw., 1 Coll. 507 ; The Earl of Mexborough *v.* Bower, 7 Beavan, 127. But it is said in Isenberg *v.* East India House Estate Co., 10 Jur. N. S. 221, that a mandatory injunction should be granted with great caution, and should probably be confined to cases where the injury cannot be estimated and sufficiently compensated by a pecuniary payment. And see Jacomb *v.* Knight, on appeal, 32

inform the defendant of the precise limits of his right, and * not expose him, in the exercise of such right, to the consequence of violating so vague an injunction.[2]

2. But it has been common to produce a positive effect, through an injunction out of chancery, by means of a prohibitory order.[3] And notwithstanding the practice has been questioned sometimes,[4] it has continued to receive the countenance of the courts of equity.[5] A mandatory order is nothing more than a decree of specific performance, which is every day's practice in courts of equity, and which is seldom denied, unless where the remedy at law is perfectly adequate.[6]

3. A court of equity will not grant an injunction against a non-resident trustee of railway mortgage bonds, the purpose of which is to transfer a litigation pending in the courts of the state where such trustee resides into another forum for decision.[7]

4. The question of courts of equity issuing mandatory injunctions, was considerably discussed in a recent case in the Court of Chancery Appeal.[8] The point is thus stated in the head note. In this as in other cases of injury to easements the court looks to the particular circumstances of each case; but it will interfere by way of mandatory injunction only in cases where extreme or very serious damage will ensue from non-interference.

5. The court here very distinctly repudiate the proposition main-

L. J. Ch. 601; s. c. 8 L. T. N. S. 621; Attorney-General *v.* Metropolitan Board of Works, 9 L. T. N. S. 139.

[2] Cother *v.* Midland Railw., 2 Phillips, 469; 5 Railw. C. 187. And the same doctrine is maintained in Dover Harbor *v.* London, &c. Railw., 30 L. J. Ch. 474; Tillett *v.* Charing Cross Co., 26 Beav. 419; s. c. 5 Jur. N. S. 994.

[3] Lane *v.* Newdigate, 10 Vesey, 192.

[4] Blakemore *v.* The Glamorganshire Canal, 1 My. & K. 154.

[5] *Shadwell*, V. C., in Spencer *v.* London & Birmingham Railw., 8 Sim. 193, 198.

[6] 2 Story, Eq. Jur. § 727 *et seq.*; Sears *v.* Boston, 16 Pick. 357. But where the plaintiff's part of an agreement consisted in devoting himself to the service of a company, agreed to be formed for the purpose of testing and turning to account certain patents of plaintiff's, which were also agreed to be conveyed to the company when formed, the court declined to decree specific performance of the contract on the part of defendant, inasmuch as they had no power to compel specific performance of the contract on the plaintiff's part. Stocker *v.* Wedderburn, 3 Kay & J. 393; s. c. 30 Law Times, 71. See also Dietriehsen *v.* Cabburn, 2 Phill. 52. Lumley *v.* Wagner, 1 De G. M. & G. 604.

[7] Bellows Falls Bank *v.* Rutland & Burlington Railw., 28 Vt. 470.

[8] Durrell *v.* Pritchard, 12 Jur. N. S. 16 (1866). And in a later case Durrell *v.* Pritchard, Law Rep. 1 Ch. 244, the court held, that a mandatory injunction

tained by the Master of the Rolls in the same case, when * before the court, that a court of equity will in all cases reject an application for an injunction where the wrong complained of has already been inflicted,[9] for the continuing act must cause new damage so long as it is permitted.

SECTION XVIII.

Remedy provided in Charter does not supersede resort to Equity.

1. *Special provisions of charter do not commonly affect the jurisdiction of courts of equity.*
2. *Recent English statutes supersede such jurisdiction chiefly, in suits at law.*

§ 222. 1. In most of the cases where the court interferes by injunction, in favor of land-owners and others, the party has a remedy under the provisions of the act. But this does not defeat the jurisdiction of the court, under the usual restrictions and limitations, which regulate the jurisdiction of courts of equity, in regard to legal rights.[1]

2. It is now understood by the profession, doubtless, that by the recent statutes in England it is competent to obtain an injunction at law, at the time of issuing the summons in the action; and at the final hearing such injunction may be made perpetual, or discharged, as justice shall require; and in case of disobedience, such writ of injunction may be enforced by the court, by attachment, or, when such court shall not be sitting, by a single judge at chambers. This injunction may also be applied for, at any stage of the proceedings at law. These statutory provisions serve pretty effectually to supersede the necessity of any resort to courts of equity, in aid of legal rights and remedies, in the courts of common law in Westminster Hall. But in practice it is said that equitable remedies are still sought almost exclusively in the courts of equity there, the same as before these provisions were extended to the courts of law.

may be granted where the injury is already complete, whether to easements, or other rights, but only to prevent very serious damage.

[9] Deere *v.* Guest, 1 My. & Cr. 516; Durrell *v.* Pritchard, 11 Jur. N. S. 576.

[1] Coats *v.* The Clarence Railw., 1 R. & M. 181.

*SECTION XIX.

Wilful Breaches of Injunctions.

1. *Statement of case.* | 2. *Opinion of the Vice-Chancellor.*

§ 223. 1. In a late case before Vice-Chancellor *Knight Bruce*,[1] an injunction had issued, restraining the defendants from further interfering with a particular road, and from so constructing their works as to obstruct, impede, or render less secure such road. The company then laid their permanent rails over the road, on a level, and by direction of the commissioners of railways erected gates across the road, for the security of passengers, and with the sanction of the commissioner opened the line for public traffic. The court, on application to punish the company for disobedience of the order, directed a sequestration to issue, and under the particular circumstances refused to suspend the order until an appeal could be heard. The language of the learned judge is worth repeating: —

2. "Then comes the question, what, if any thing, the court ought to do, — because it does not necessarily follow that the process asked must issue. It is upon the defendants, however, to make a case to exempt them from it; and perhaps, if they had shown their proceedings not to be plainly and clearly illegal, — I mean illegal independently of any question of contempt, — or had satisfied the court that the injunction ought not to have been granted at all, or ought to be dissolved, discharged, or put into a shape more favorable to them than it is; or had stated that they had appealed from it, or from the order granting it, or intended to do so, I might have declined or delayed allowing the process to go. But none of these things have they done. On the contrary, my belief is strengthened of the utter impropriety, without any reference to the injunction of this suit, of the acts alleged to be also a contempt of this court. My opinion is more fixed, that the injunction, instead of going too far, does not go far * enough, and that it is one of which the company cannot justly complain. Considering their conduct to be at once contemptuous and otherwise illegal;

[1] The Attorney-General *v.* The Great Northern Railw., 4 De G. & S. 75; s. c. 3 Eng. L. & Eq. 263; Attorney-General *v.* London & Southwestern Railw., 3 De G. & Smale, 439.

* 360, 361

to be wrongful as against the plaintiff individually, wrongful as against her Majesty's subjects at large, and, indeed, a bad — I had almost said a scandalous — example; whatever amount of inconvenience may result from acting against the company on this occasion, I think it right to deal with them according to their merits. The consequence may possibly be to stop the railway. I answer again that it ought to be stopped, for it passes where it does by wrong. The directors of the company, their agents and servants, cannot, on this motion, be committed to prison; but what can be done shall by me be done to repress this daring invasion of public and private rights, — an invasion maintained moreover in open defiance of all law, authority, and order. Let a sequestration issue." [2]

SECTION XX.

Questions of Costs in Equity.

1. *Costs most commonly awarded to prevailing party.*
2. *If parties compromise merits, court will not decide question of costs.*

§ 224. 1. Costs in courts of equity do not follow the result of the decision as in cases at law. It is requisite that the court order costs to entitle the party to claim them.[1] But it is now the settled practice of the courts of equity to give the prevailing party costs,[2] unless there are some very peculiar circumstances, whereby he is not entitled to claim costs, as that of a * mortgagee in possession who has not been offered the amount due upon the mortgage;[3] and some others.

2. But courts of equity have always declined to determine a

[2] But the court refused to grant an attachment against a railway company for disobedience to a writ of injunction, enjoining them to desist from giving an undue preference in respect to the carriage of coals, to persons carrying coals from Peterborough and other places to certain other places named in the rule, the affidavits on the part of the company showing a *bona fide* intention to conform to the order of the court, although it appeared that the reformed scale of charges still operated in some respects injuriously to the plaintiffs and advantageously to the other parties. Ransome *v.* Eastern, &c. Railw., 4 C. B. N. S. 135.

[1] Travis *v.* Waters, 1 Johns. Ch. 85; s. c. 12 Johns. 500.

[2] Perine *v.* Swaim, 2 Johns. Ch. 475.

[3] Catlin *v.* Harned, 3 Johns. Ch. 61. And in a recent English case, Stocker *v.* Wedderburn, 3 Kay & J. 393; s. c. 30 Law Times, 72, Vice-Chancellor *Wood*, having given judgment against the plaintiff on demurrer, ordered that he should pay costs, notwithstanding the general equity of his claim, saying, "I am not

question of costs merely.[4] If the parties have compromised the merits of the cause, or referred it to arbitrators, and reserved the question of costs for the court of equity, that court will ordinarily decline to try the whole case in order to determine a question of costs, but will leave each party to pay his own costs.[4]

SECTION XXI.

Suits on behalf of Others.

§ 224 *a*. A shareholder is not precluded from bringing a suit on behalf of himself and other shareholders, although he may be the only one desiring to sue. And if the party bringing the suit on behalf of himself and others have so conducted as to preclude his right to sue, he cannot maintain the suit, because there are others for whose benefit the suit is brought, not affected in the same manner with himself.[1]

*SECTION XXII.

Receivers. — Their Appointment and Duties.

1. *It often becomes necessary to put railways into the hands of receivers.*
2. *Appointed where necessary to reach income of estate.*
3. *Cases numerous where property of corporations placed in receivers' hands.*
4. *That is the legitimate mode of granting execution in equity.*
5. *The receiver not subject to the process of any other court. Exceptions.*
6. *This does not affect the priority of liens.*
7. *Subsequent mortgagee may have receiver. How extended.*
8. *Courts of equity will appoint one receiver in all suits.*
9. *Receiver represents only parties to particular suit.*
10. *Liable for money in his hands to same extent as other trustees.*
11. *All persons having any agency in matter liable as receiver.*
12. *So also of one having any custody of the money.*

§ 224 *b*. 1. In consequence of railway projects and railway enterprises after going into operation sometimes proving unproductive,

bound to assume that all the allegations in the bill are true for the purpose of determining who shall pay costs; otherwise in every case defendants might be driven to defend a case up to the hearing, instead of demurring, in order to save costs.

[4] Lord *Hardwicke*, in 2 Vesey, sen. 222, 223, 284; Chancellor *Kent*, in Eastburn *v.* Downes, 2 Johns. Ch. 317. But some exceptions have been reluctantly admitted, under protest. Tower *v.* Eastern Counties Railw., 3 Railw. C. 374.

[1] Burt *v.* British Life Insurance Asso., 4 De G. & J. 158; s. c. 5 Jur. N. S. 612.

and having either to be abandoned and wound up, or else to change ownership, in satisfaction of mortgages and other liens, it often becomes necessary to place the works in the hands of a receiver of the court, who will hold the money earned upon special deposit, subject to the final or interlocutory order of the court.

2. The rule in courts of equity in regard to appointing a receiver of mortgaged property is, that it will be granted in all cases where the income of the estate is required to meet the incumbrance, and is at the present time being so applied as not to be legally applicable to reduce the incumbrance.

3. The cases are very numerous, both in the English and American books, where the property of corporations has been sequestered by virtue of an order in a court of chancery, and placed under the custody, control, and management of a court of chancery through the agency of a manager or receiver.[1] In a late case in Vermont, Cheever *v.* Rutland & Burlington Railw. 39 Vt. 653, where a controversy existed between different mortgagees as to the possession of a railway and its furniture and fixtures, the court said: The ground on which courts of equity intervene, either by injunction or the appointment of a receiver, is the preservation of the property in controversy pending the litigation. But where the mortgagor, or his assigns, are in possession, denying the right of the mortgagee to a foreclosure, the court will not, upon the mere basis of the mortgagees' prior right at law, transfer the possession of the property to him, pending the litigation. The most which can be done in such case is to appoint a receiver to preserve the property and its issues for the party ultimately entitled.

4. And it was said by Lord *Eldon*,[2] that it afforded no invincible * obstacle to the court appointing a manager or receiver to have charge of the business of a corporation, that it might subject the court to the care and responsibility of conducting for the time the business of the company. That in equity becomes indispensable, in order to enforce the execution of a judgment or lien against them. But the court will so modify its order as to do as little

[1] Harvey *v.* East India Co., 2 Vernon, 396; Adley *v.* The Whitstable, 17 Vesey, 315, 323; Taylor *v.* Waters, 15 Vesey, 10; Chase's case, 1 Bland. Ch. 213; Williamson *v.* Wilson, id. 421; King *v.* Odom, 3 Bland. Ch. 407.

[2] Adley *v.* The Whitstable Company, 17 Vesey, 315, 323.

injury as possible, and to assume as little charge or responsibility as practicable.[3]

5. The rules of the courts of equity in regard to the office and agency of a receiver are very strict and stringent. The property while in his custody is regarded as in legal contemplation in the custody of the court.[4] The assets are thenceforth in *gremio legis*, and cannot be seized by process from any other court.[4] And as a general thing, while a railway corporation is in the hands of a receiver, the receiver is regarded as the acting party, and alone responsible to other parties, who may receive injuries by the transacting of the business of the company, either by omission of duty or positive aggression. And although the court will in most instances interfere for the protection of the receiver, on his request, that is not always done, especially where, as in some of the States, railway corporations are kept in the hands of receivers through a succession of years. And where the court of equity do not interfere to protect the receiver from his ordinary responsibility, measured by his acts, he will be held responsible for all the acts and omissions of the corporation while under his sole control and management.[5]

This subject underwent a very elaborate examination in the Supreme Court of Indiana,[6] and the following propositions were maintained: That where a railway with all its appurtenances was in the exclusive possession, use, and control of a receiver appointed by a court of competent jurisdiction, and who had the employment and control of all the hands upon the road, the possession of the receiver could not be regarded as the possession of the corporation, neither could the company be held responsible for the acts of any servant or employee of the servant. The position of the corporation is more completely obscured and extinguished, so to speak, by the works being placed under the control of a receiver by com-

[3] Where the receiver of a railway company was appointed to receive the rents, issues, and profits of the railway, it was held that it was his duty to receive the gross receipts of the company for the carriage of passengers, freights, mails, and the like, and to pay the bills for running expenses thereout, and not to receive only the surplus after paying the expenses. Simpson *v.* Ottawa & Prescott Railw., 10 U. C. L. J. 108.

[4] Peale *v.* Phillips, 14 How. 368, 374, 375.

[5] Cooley *v.* Brainerd, 38 Vt 394; Blumenthal *v.* Same, id. 402.

[6] Ohio & Miss. Railw. *v.* Davis, 23 Ind. 553.

pulsory proceedings in the courts, than by any voluntary surrender of the road and its operation into the hands of lessees or mortgagees, where it has generally been held, that the corporation may still be held responsible.[7]

6. The appointment of the receiver does not operate to derange the priority of legal or equitable liens. The money in his hands is in the custody of the law for whoever can make title to do it, and when the party entitled to the estate is ascertained, the receiver will be his receiver.[8]

7. Where there are different mortgages, and the first mortgagee does not assume possession of the property, or take any steps towards foreclosure, any subsequent incumbrancer may take possession, or have a receiver appointed to hold the rents, issues, and profits for his benefit until those who have a prior right claim them by some definite action in that direction.[9] But where the prior mortgagee takes proceedings to enforce his lien, the same receiver will be appointed in his suit, which is, in fact, but an extension of the receivership so as to include the prior mortgage and suit.[9] And the subsequent incumbrancer will not be obliged to refund any rents received by himself before the prior incumbrancers took possession or brought suit.[10]

* 8. It is not in conformity with the practice of courts of equity to appoint different persons to be receivers in different suits affecting the same property, but to extend the receivership from time to time as different suits are instituted, so as to have the one receivership embrace the whole property and all the suits.[11] And if the former receiver declines to act after the receivership is extended to other suits, he will be discharged, and another appointed embracing all the suits.[11]

9. It seems to be entirely well settled, that the receiver represents all the parties in the suits wherein he has been appointed, but that he does not represent strangers to the suits, or any not in privity with the parties.[12]

[7] *Ante*, § 142, n. 8. See also Ballou v. Farnham, 9 Allen, 47; Lamphear *v.* Buckingham, 33 Conn. 237.

[8] *Nelson*, J., in Wiswall *v.* Sampson, 14 How. 52, 65.

[9] Howell *v.* Ripley, 10 Paige, 43.

[10] Thomas *v.* Bugstocke, 4 Russ. 64.

[11] Caggee *v.* Howard, 1 Barb. Ch. 368.

[12] Booth r. Clark, 16 How. 322; Porter *v.* Williams, 5 How. Pr. 441; s. c. 5 Seld. 142.

10. The degree of responsibility of the receiver for money once in his hands is much the same as that of any other trustee. If he mix it with his own money, or deposit it on private account, he thereby becomes responsible for any accident befalling it.[13] It has been held, that where the trustee deposits the money to the credit of the trust with a bank or banker of good credit, at the time, and the money is lost through the unexpected insolvency of the depositary, he will not be held accountable.[14] But if he deposit the money in his own name, or part with the control of it to any extent, even to permitting a surety to have a veto upon drawing it, and the banker fail, he must bear the loss.[15]

11. All persons into whose hands the trust funds can be traced and identified will be responsible for their restoration, as becoming themselves involuntary trustees, or trustees *in invitum*. This is a familiar principle of equity law, applicable to all matters of trust, and illustrated by numerous decisions.[16] This principle is illustrated in a very recent case, where the receiver paid over the money in pursuance of a garnishee's order, supposing it proper that it should go in that direction, but the court being of a different opinion, ordered the person to whom it had been so paid to refund the money.[17] And in the same case,[18] the Master of the Rolls said: "The receiver could not have received any thing except under the order of the court, and * the money is therefore strictly money belonging to the court, and the receiver can only discharge himself by paying obedience to its order."

12. Where property is laid under an injunction by a court of equity, and placed in the hands of a manager or receiver, every person concerned in the custody or disbursement of the receipts of such property, or in its use, is responsible to refund the same to the court to enable it to decree the same to the parties found ultimately to be entitled to it.[19]

[13] 2 Redf. on Wills, 881, 882, and cases cited.

[14] Knight *v.* Lord Plimouth, 3 Atk. 480; Rowth *v.* Howell, 5 Vesey, 565.

[15] Massey *v.* Banner, 4 Madd. 416, 417; Clarke *v.* Tapping, 9 Beav. 284; White *v.* Baugh, 9 Bligh. N. S. 181; s. c. 3 Cl. & Fin. 44; Thew *v.* Kiston, 1 Vesey, 377.

[16] Bodenham *v.* Hoskins, 2 De G., M. & G. 903; s. c. 21 Eng. L. & Eq. 643.

[17] De Winton *v.* Mayor of Brecon, 8 Jur. N. S. 1046; s. c. 28 Beav. 200.

[18] Lane *v.* Sterne, 3 Giff. 629; s. c. 9 Jur. N. S. 320.

[19] *In re* Ward, 31 Beavan, 1.

*CHAPTER XXX.

INDICTMENT.

SECTION I.

Indictments against Railway Companies.

1. *Are liable to indictment for obstructing public highway.*
2. *Corporations liable to indictment for misfeasance as well as non-feasance.*
3. *Not liable to indictment for disturbing quiet by proper use of locomotives.*
4. *Where the company have the right to divert highways, it is for the jury to determine whether it is done in a reasonable manner.*
5. *All that is requisite is, that it produce no serious public inconvenience.*
6. *Order, or conviction of company, in relation to repair of highways, may be general.*
7. *Signals required to be given at highway crossing on level.*

n. 2. *Review of the cases upon the subject.*

§ 225. 1. RAILWAY companies are liable to indictment for obstructing a public highway contrary to the powers granted in their act. For instance, obstructing a carriage turnpike-road, by the piers of a railway bridge.[1] So also for cutting off a public highway, and obstructing travel upon it, without, or before, constructing a substitute in the manner required by their act.[2] The

[1] Reg. *v.* Rigby, 14 Q. B. 687; s. c. 6 Railw. C. 479. The footpaths upon the bridge are not to be reckoned as a part of the requisite width of the bridge. *Ante*, § 105. See also Bristol & Exeter Railw. *v.* Tucker, 13 C. B. N. S. 207; s. c. 7 L. T. N. S. 464; Fosberry *v.* Waterford & Limerick Railw., 13 Ir. Com. Law Rep. 411. An indictment cannot be sustained against a railway company for a nuisance in the obstruction of a highway while it is under the sole management of a receiver, appointed by the Court of Chancery, over whose acts the company have no control. State *v.* Vt. Central Railw., 30 Vt. 108. But on an indictment for obstructing a highway, if it appear that the obstruction has been removed, that is substantially an end of the proceedings, the object having been already attained. Per *Wightman*, J., Regina *v.* Paget, 3 F. & F. 29.

[2] Queen *v.* Scott and others, 3 Q. B. 543. This is an indictment against the officers and agents of the company. But it is held the company is also liable to indictment. Queen *v.* Great N. of Eng. Railw., 9. Q. B. 315; State *v.* Vermont Central Railw., 27 Vt. 103. *Ante*, § 130; Commonwealth *v.* Nashua & Lowell Railw., 2 Gray, 54; Springfield *v.* Conn. River Railw., 4 Cush. 63; Commonwealth *v.* New Bedford Bridge Company, 2 Gray, 339. This subject

* company may use the highways for making up their trains to a reasonable extent, if they do not abridge the rights of others hav-

was very considerably discussed in Reg. v. Birmingham & Gloucester Railw. Company, 9 C. & P. 469; s. c. 3 Q. B. 223, and the same result reached as in the late case of Queen v. Great North of England Railway. The opinion of *Patteson*, J., 3 Q. B. 231, when the former case was determined in the Queen's Bench, embraces a brief and comprehensive abstract of the early English decisions upon the subject.

"Upon the argument it was not contended on the part of the company that an action of trespass might not be maintained against a corporation; for, notwithstanding some dicta to the contrary in the older cases, it may be taken for settled law, since the case of Yarborough v. The Bank of England, 16 East, 6, in which the cases were reviewed, that both trover and trespass are maintainable; but it was said that an indictment will not lie against a corporation. Only one direct authority was cited for this position: and it is a *dictum* of Lord *Holt* in an anonymous case reported in 12 Mod. 559. The report itself is as follows: 'Note: per *Holt*, Ch. J. A corporation is not indictable, but the particular members of it are.' What the nature of the offence was to which the observation was intended to apply does not appear: and as a general proposition it is opposed to a number of cases, which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults. Hawk. P. C., B. 1, c. 66, § 13, Vol. ii. p. 58, 7th ed.

"A corporation aggregate may be liable by prescription, and compelled to repair a highway or a bridge. Hawk. P. C., B. 1, c. 76, § 8; c. 77, § 2, Vol. ii. pp. 156, 258: and in the case of Rex v. The Mayor, &c. of Liverpool, 3 East, 86, the corporation were indicted by their corporate name for non-repair of a highway, and, upon argument in this court, the indictment was held to be defective; but no question was made as to the liability of a corporation to be indicted.

"In the case of Rex v. The Mayor, &c. of Stratford-upon-Avon, 14 East, 348, the corporation was indicted by its corporate name for non-repair of a bridge, and found guilty, and upon argument in this court, the verdict was sustained, and no question made as to the liability generally of a corporation to an indictment for breach of a duty cast upon it by law.

"Upon the discussion of the question in the present case, the counsel for the company relied chiefly upon the circumstance of the indictment being found at the Quarter Sessions (it was so put, hypothetically, in the argument for the defendants), where the company could not appear and take their trial, even if so disposed, as a corporation can only appear by attorney, and the appearance at the sessions must be in person. We think there is no weight in this objection. It may indeed impose some difficulty upon the prosecutor, and render his proceeding more circuitous, as he will be obliged to remove the indictment by *certiorari* into this court in order to make it effective; but the liability of the corporation is not affected.

"In the case of Rex v. Gardner, 1 Cowp. 79, it was objected that a corporation could not be rated to the poor, because the remedy by imprisonment upon failure of distress was impossible; but the court considered the objection of no

ing * equal right to use them; but they have no right to make use of the highway as part of their freight-yard.[3]

2. It has sometimes been maintained that a corporation aggregate is not liable to indictment for misfeasance, but only for nonfeasance. But the case of Reg. *v.* G. N. of England Railway settled that question upon elaborate argument and great consideration.[4]

* It was held that where the surveyors of highways object to a

weight, though it might be that there would be some difficulty in enforcing the remedy.

"The proper mode of proceeding against a corporation, to enfore the remedy by indictment, is by distress infinite to compel appearance, after removal by *certiorari*, as suggested by Mr. Baron *Parke* in this very case, reported in 9 Car. & Payne, 469, and as appears by Hawk. P. C., B. 2, c. 27, § 14, Vol. iv. p. 140, and the cases cited in 6 Vin. Abr. 310, &c., tit. Corporations (B. a.), Vol. iv. p. 140.

"We are therefore of opinion that upon this demurrer there must be judgment for the crown." See also Regina *v.* Haslemere, 3 B. & S. 313; Regina *v.* Heytesbury, 8 L. T. N. S. 315.

In this country the subject has been somewhat discussed and variously determined. In addition to the cases already cited in this note from the American reports, we may here refer to State *v.* Morris & Essex Railw. Company, 3 Zab. 365, where the general views stated in the text are maintained. This case was on an indictment against the Morris & Essex Railw. Company for a nuisance, in erecting and continuing a building, and also for leaving their cars in the public highway, and the indictment was sustained, the court saying that "a corporation cannot be liable for any crime of which a corrupt intent, or *malus animus*, is an essential ingredient. But the creation of a mere nuisance involves no such element."

See also Lyman *v.* White River Bridge Co., 2 Aiken, 255; Dater *v.* The Troy Turnpike & Railw. Co., 2 Hill, 629; Bloodgood *v.* Mohawk & Hudson Railw., 18 Wendell, 9; Chestnut Hill Turnpike Company *v.* Rutter, 4 S. & R. 6, 16; Whiteman *v.* W. & S. Railw., 2 Harr. 514.

The English courts make no question in regard to corporations aggregate being liable for torts, committed by their agents in the proper business of the company. Glover *v.* The N. W. Railw., 19 Law J. 172; Duncan *v.* Surrey Canal Company, 3 Starkie, 50. See *post*, § 226, pl. 8; Ellis *v.* London & S. W. Railw., 2 H. & N. 424. And in Commonwealth *v.* Old Colony, &c. Railw., 14 Gray, 93, it was held, that a railway laid out and over a public highway, so as to obstruct it, without express authority or necessary implication from the statute, was indictable as a nuisance. Hewett *v.* Swift, 3 Allen, 420.

[3] Gahagar *v.* Boston & Lowell Railw., 1 Allen, 187.

[4] A railway will be restrained from carrying on other business beyond the scope of its powers at the suit of the Attorney-General, on the relation of a stranger to the company. Attorney-General *v.* Great Northern Railw., 1 Drew & Sm. 154.

road which has been substituted for a former road, they are not authorized to obstruct it, but must enforce the usual legal remedies upon the company, by mandamus, indictment, or bill in equity, as the case may be.[5]

3. But where by their act a railway company are permitted to build their road, and run locomotive engines parallel and adjacent to an ancient highway, whereby the horses of persons using the highway as a carriage road are frightened, it was held, on indictment against the company for a nuisance, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, and that the company were therefore not liable.[6]

4. By their charter a company were empowered "to divert or alter any roads or ways, in order the more conveniently to carry the same over or under the railway." The company, in carrying a road under the railway, had erected a skew bridge, which diverted the road at an angle of 45° instead of 34°, which was the angle made at that particular point by the old line of road. At the trial of an indictment against the company's engineer for so doing, the learned judge directed the jury, that if the public sustained inconvenience by the alteration, they should find for the crown. But if they thought that no material practical inconvenience was sustained by the public in having the present bridge instead of the other, and that an experienced engineer would have so constructed it, having regard both to the interest of the * public and the company, they had a right to make such diversion, and the verdict should be for defendant. The verdict being for defendant, with leave to move the full bench to enter a verdict for the crown, and the question being discussed, the court declined to interfere.[7]

[5] London & Brighton Railw. *v.* Blake, 2 Railw. C. 322.

[6] The King *v.* Pease, 4 Barn. & Ad. 30. It is made a question how far a nuisance may be justified upon the ground that public benefits have resulted from the works causing the alleged nuisance. The King *v.* Russell, 6 B. & C. 566. In this case the affirmative is held by two judges, against Lord *Tenterden*, Ch. J.

One would conjecture that the opinion of the chief justice is the law upon that subject. But there can be little doubt, perhaps, that when the legislature allow that to be done, which would otherwise be a nuisance, it will be valid, upon the ground that they are the proper judges, when the public good requires the works. The King *v.* Morris, 1 B. & Ad. 441.

[7] The Queen *v.* Sharpe, 3 Railw. C. 33.

5. Lord *Denman*, Ch. J., said: "It is impossible that a verdict should be entered for the crown. In the case of obstruction of light, we leave it to the jury whether any real inconvenience is sustained, though some light may demonstrably be obscured." *Parke*, B., said at the trial, "that in a case before him, Regina *v.* London and Southampton Railway, as to the power which a company had to make a road over a public highway, he laid it down, that if possible, the work must be constructed without any inconvenience to the public, but if it could not be done without some such inconvenience, it must be done with the least possible."

6. An order of justices upon a railway for repair of a highway, in regard to damage done by them, need not state the particulars of damage or repair; it is sufficient to state the length of the damaged part of the road, and order the company to make good all damage done. The order and conviction for disobedience may include several highways in the same parish.[8]

7. A statute requiring signals to be given by the whistle or bell of the locomotive, within certain prescribed distance of any crossing of a highway upon a level with the railway, requires the signal before the crossing, and not after.[9]

Indictment to recover the fine imposed upon a railway, where the life of a person is lost by carelessness thereon, must be against the company, and not against the individual stockholders, and when the fine goes to the surviving relatives of the deceased, the indictment should show that there are such surviving relatives.[10]

[8] London & North W. Railw. *v.* Wetherall, 2 Eng. L. & Eq. 265; s. c. 15 Jur. 247.

[9] Wilson *v.* Rochester & Syracuse Railw., 16 Barb. 167.

[10] State *v.* Gilmore, 4 Foster, 461. The owner of works, carried on for his profit by his servants, may be indicted for a public nuisance caused by their act, while carrying on the works, although done without special direction, and contrary to his general order. Queen *v.* Stephens, Law Rep. 1 Q. B. 702. A railway company, duly authorized to lay their track in one of the streets of a city, are not, without proof of negligence, liable for accidental injuries resulting to individuals thereby. Proof of negligence, or want of care or skill in the manner of constructing and maintaining the track, is necessary to entitle a person whose property sustains damage thereby, as by a horse catching the hoof between the rails of the track, to maintain an action therefor. Mazetti *v.* N. Y. & Harlem Railw., 3 E. D. Smith, 98. In a late English case at *nisi prius*, on an indictment against the engine-driver and fireman of a railway train for manslaughter

*SECTION II.

How far Railways may become a Public Nuisance.

1. *Use of public streets of a city, by permission of city authorities, by railway, not a nuisance.*
2. *But the use of locomotives in vicinity of a church on Sunday may become a nuisance.*
3. *City authorities may grant railway leave to use streets or to tunnel.*
4. *But company must not unnecessarily interfere with comfort of others in such use.*
5. *The slight obstruction of navigable waters by railway company, authorized by act of legislature, not a nuisance.*
6. *Such grants construed strictly. Any excess of authority becomes a nuisance.*
7. *Company not justified in building stations for passengers or freight in highway.*
8. *Aggrieved persons cannot take redress into their own hands.*
9. *Nor can one suffering in common with others, but in a greater degree, maintain an action. But the owner of the fee of land under the highway may restrain a railway company from occupying it for a station.*

§ 226. 1. A railway passing through the streets of a populous village or city is not of course a nuisance.[1] But it has been * held, that a city has such interest in the soil of their streets, that the legislature cannot empower a railway company to use them for a railway track without compensation, and that it pertains to the corporation of a city to determine the mode of propelling cars

of persons killed while travelling in a preceding train by the prisoners' train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the usual rules, and altered the signal for danger so as to make it mean "proceed with caution"; that the trains were started irregularly by the superior officers of the company at intervals of about five minutes; that the preceding train had stopped for three minutes without any notice to the prisoners except the signal for caution; and that their train was being driven at an excessive rate of speed; that then they did not slacken immediately on perceiving the signal, but almost immediately; and that as soon as they saw the preceding train they did their best to stop, but without effect. It was held that if the prisoners honestly believed they were observing the rules as given to them, and if these rules were not obviously illegal, they were not criminally responsible; that the fireman being bound to obey the directions of the engine-driver, and so far as appeared having done so, there was no case against him; that even against the engine-driver, although there was evidence of excessive speed and insufficient lookout, the evidence was so slight that it would be reserved for the court of criminal appeal whether there was any case at all. Regina *v.* Trainer, 4 F. & F. 105. The decision of the Court of Criminal Appeal on the question is not as yet known. And see Reg. *v.* Benge, 4 F. & F. 504.

[1] Hentz *v.* Long Island Railw., 13 Barb. 646; New Albany, &c. Railw. *v.* O'Dailey, 12 Ind. 551.

within its limits, whether by steam or horse power, and the rate of speed.[2]

2. It was held, that a railway company, having, by running their cars and engines, and ringing bells, whistles, letting off steam, &c., upon Sunday, in the immediate vicinity of a church, so annoyed and molested the congregation worshipping there, as greatly to depreciate the value of the house, and render the same unfit for religious worship, were liable to an action at the suit of the church in its corporate capacity.[3] It seems that a court of equity will not enjoin a street railway company from running their cars upon Sunday in violation of the statutes of the State.[4] The proper remedy is by enforcing the penalty of the statute, or by indictment for nuisance, when the prosecutor suffers damage only in common with other citizens.

3. A railway may use the public streets for their vehicles, by license from the city authorities, when such use does not unreasonably abridge the public use of such streets for other purposes.[5] Where a railway was authorized by the municipal authorities of a city to build a tunnel through the city, an injunction was denied, at the suit of a land-owner, claiming the work to be a nuisance.[6]

[2] Dounaher *v.* The State, 8 Sm. & Mar. 649; Moses *v.* Pittsburg, &c. Railw. 21 Ill. 516.

[3] First Baptist Church in Schenectady *v.* S. & T. Railw., 5 Barb. 79. But see Same *v.* The Utica & Sch. Railw., 6 Barb. 313, where it is held that the action will not lie in the name of the corporation, the damage being to the worshippers, and not to the corporators. But from a note to this case it appears that it was decided before that reported 5 Barb. 79, and probably not brought to the attention of the court in that case.

[4] Sparhawk *v.* Union Passenger Railw., 54 Penn. St. 401.

[5] Drake *v.* Hudson River Railw., 7 Barb. 508.

[6] Hodgkinson *v.* Long Island Railw., 4 Edwards, Ch. 411. And the Court of Common Pleas, New York City, refused to restrain the city councils from rescinding an ordinance prohibiting the use of steam power upon railways below Forty-second Street. Teneyck *v.* The Mayor, &c. and N. Y. & H. Railw., 10 Am. Railw. Times, No. 42.

Brady, J., in giving judgment, said, "I should feel at liberty to determine that the use of steam below Forty-second Street by the company was a nuisance which should be arrested at once, if there was no act of the legislature authorizing it; but with such an act before me, it is equally my duty to say, for the reasons hereinbefore assigned, that such use of steam is not a nuisance, and cannot be restrained."

Where a person, without the authority of Parliament, but with the concur-

* 4. On demurrer to a declaration, alleging that a railway company obstructed a public street adjoining the plaintiff's house, that they kept up dangerous fires, and did various other acts that made his residence unwholesome and uncomfortable, and that they did these things unlawfully, and with intent to injure him, it was held to be a good cause of action, as the court could not presume such acts to be lawful under the particular circumstances; but if the company claimed the right to do such acts at the time and place, it was incumbent upon them to show such right, by plea or otherwise.[7]

5. And it was held, that the slight but unavoidable obstruction of public navigable rivers by a railway company, under the authority of the state legislature, is a necessary evil, which must be borne for the sake of the public good, which demands it. That which would otherwise be a nuisance, if done under the authority of law for the public good, is justifiable.[8] It has been held also, that grants to a railway company, or similar public work, which unavoidably cause obstruction to the navigation of a navigable river, are not to be regarded as *per se* a nuisance, but lawful.[9]

6. But such grants are to be construed strictly, and if built upon a plan which would occasion obstruction to the navigation beyond what the charter authorized, the works would be a nuisance.[9] Every erection in a navigable river, without legislative permission, which obstructs navigation, is a nuisance.[9] So, too, where a railway company, by a wrong construction of * their act, locate their

rence of, and by virtue of a contract with, the vestry of the parish, laid down in one of the streets of the city a double line of tram-ways on which omnibuses of a peculiar construction plied for hire, and these tram-ways were dangerous and inconvenient to the public, as the wheels of vehicles skidded when crossing the tram-way, and horses putting their feet upon it were startled, this was held to be a public nuisance, even though these tram-ways were for the public conveyance generally. Regina *v.* Train, 2 B. & S. 640.

[7] Parrot *v.* The C. H. & D. Railw., 3 Ohio N. S. 330. Where a person was engaged in blasting a stone quarry, and, by using an excessive charge of powder caused a great quantity of stones to fall upon the public highway, and upon houses adjacent to the quarry and highway, he was held rightfully convicted upon an indictment which charged him with a nuisance to the highway. Regina *v.* Mutters, 1 L. & C., C. C., 481; s. c. 10 Cox, C. C. 6.

[8] Attorney-General *v.* Hudson River Railw., 1 Stockton (N. J.), Ch. 526.

[9] Newark Plank-Road Co. *v.* Elmer, 1 Stockton (N. J.), Ch. 754.

road where they are not authorized, it becomes a nuisance on every highway it touches in its illegal course.[10]

7. Railways are not justified in building depots for freight or passengers within the limits of the public highway, or so near it that their trains must injuriously obstruct the public travel. The right of the public in the highway is paramount to that of the company, for all other purposes except that of transit.[11]

8. But it has been said by experienced judges, and with great reason, as it seems to us, that where a railway erect gates, or cause any other obstruction to a public or private way, by means of doing defectively or imperfectly what they had the legal right to do in another form, it is not competent for those who feel themselves aggrieved, or who are in fact so, to take the redress of their wrongs into their own hands, and forcibly remove the obstacle. They should apply to the proper tribunal for a mandamus, or other appropriate remedy.[12]

9. An individual cannot maintain a bill in equity to restrain a nuisance which injures him only in common with the public generally, although in a greater degree. The proper remedy in such case is by information in the name of the attorney-general, or by indictment. But where a railway company were building their station in the street, in front of the plaintiff's dwelling, he owing the fee of the land, it was held sufficient ground for interference by way of injunction at the suit of the party.[13]

[10] Commonwealth *v.* Erie & Northeast Railw., 27 Penn St. 339; Same *v.* Vt. & Massachusetts Railw., 4 Gray, 22; Same *v.* Nashua & Lowell Railw., 2 Gray, 54; Same *v.* New Bedford Bridge, id. 339, 345.

[11] State *v.* Morris & Essex Railw., 1 Dutcher (N. J.), 437; s. c. 3 Zab. 360; State *v.* Vermont Central Railw., 27 Vt. 103. See also Commonwealth *v.* Nashua & Lowell Railw., 2 Gray, 54; Same *v.* New Bedford Bridge, id. 339; Same *v.* Vt. & Mass. Railw., 4 Gray, 22; Gerring *v.* Barfield, 11 L. T. N. S. 270; s. c. 16 C. B. N. S. 597.

[12] Ellis *v.* London & S. W. Railw., 2 H. & N. 424.

[13] Higbee *v.* Camden & Amboy Railroad, 4 C. E. Green, N. J. Ch. 276.

SECTION III.

Indictment for Offences against Railways.

1. *Railway tickets chattels. Railway pass subject of forgery.*
2. *Under the English statute, indictments for obstructing railway carriages, or endangering persons therein.*
n. 4. *Loss of railway ticket. Negotiability of same.*
n. 5. *Right of street railways to unobstructed track.*

§ 227. 1. If one obtain a railway ticket from the company by false pretence, and thus is enabled to travel upon the railway, this is an offence for which an indictment will lie.[1] And if such * ticket be fraudulently taken it is larceny, although the ticket would have been delivered up at the end of the journey.[2] The forging of a railway pass is an offence at common law, but the mere uttering of it is no offence, unless some fraud was actually perpetrated.[3] "A railway ticket is a valuable chattel, and an indictment for obtaining it of one of the company's servants, by false pretences, is sustainable, although it is to be given up at the end of the journey; that does not prevent it, while of value to the holder, as enabling him to travel gratis, from being a chattel, the stealing of which, or obtaining by false pretence, and with intent to defraud the company, is an offence."[4]

[1] 7 & 8 Geo. IV. ch. 29, § 53; Reg. *v.* Boulton, 17 Law J. (M. C.) 152; 3 Cox, Cr. Ca. 576. On an indictment for conspiracy for the sale and transferring of a railway ticket not transferable, it was held that the prisoners must be acquitted, unless there was a previous concert between them to obtain the ticket for the purpose of fraudulently using it. Regina *v.* Absolon, 1 F. & F. 498, per *Wightman*, J.

[2] Reg. *v.* Beecham, 5 Cox, Cr. Ca. 181.

[3] Reg. *v.* Boult, 2 Car. & K. 604.

[4] Reg. *v.* Boulton, 2 Car. & K. 917, opinion of *Parke*, B., in Exch. Chamber. The newspapers speak of a case in the Common Pleas, in Ohio, where it has recently been decided that the loss of a railway ticket by a passenger falls upon the purchaser, — the ticket being negotiable by delivery, any one could ride upon it who should produce and surrender it to the conductor; that the servants of the company might lawfully eject any one from their cars who did not surrender his ticket to the conductor, although he had paid his fare and procured the ticket and lost it. But that they would, in such case, be liable for breach of duty as common carriers, to make good all loss which occurred to the passenger, by detention or otherwise, which is entirely at variance with the former portion of the decision. We should conjecture that the former part of the decision may be correctly reported, and that instead of the latter point the court may have held that the com-

2. Under the English statute, against doing "any thing to obstruct any engine, or carriage, using any railway, or to endanger the safety of any person conveyed in the same," it is not necessary to allege, or prove, that the railway was constructed, or worked, under the powers of the act of parliament.[5] It is enough * to show that the respondent wilfully did the act complained of, and that it was of a nature to endanger the safety of persons upon the railway.[5] And it is no defence in such case, that the respondent did not intend to do any injury.[5] A person who throws a stone at an engine, or carriage, using a railway, may be indicted, under the latter clause of the section,[5] for doing an act to endanger the safety of any person," &c.

pany are liable to refund the money after the ticket is recovered, not having been used, or possibly that the passenger might be entitled to pass in the cars without surrendering his ticket, in case of loss or mislaying the same, upon giving proper indemnity, by the deposit of the money until the ticket should be surrendered. In Reg. *v.* Fitch, 1 L. & C. C. C. 159, it was held that a turnpike toll-gate ticket is a receipt for money.

[5] Reg. *v.* Bowring, 10 Jur. 211. An interesting case, involving the right of street railways to an unobstructed track, was recently decided in Massachusetts. It was here held that the driver of a heavily loaded wagon on the highway having one wheel in the track of a horse railway established by the legislature, and moving at the usual rate of speed of such wagons, but slower than horse railway cars usually move, is bound to turn off from the track at the request of the conductor of a car owned by the proprietors of the horse railway, if there is room to do so, although it is usual and much easier to drive such wagons with one wheel in the railway track. And if, by not so turning off for several hundred feet, he obstructs the passage of the car at its usual rate of speed, he is liable to indictment under the statute, prohibiting the wilful and malicious obstruction of the railway, even if he did not enter upon their track with the intention of obstructing the cars, and continued thereon without intending to obstruct them, but merely for his own convenience. The court proceed upon the principle that a franchise to construct, maintain, and use a horse railway over a highway authorizes the grantees to drive their cars at the rate of speed used for vehicles drawn by horses for carrying passengers, so far as this right can be enjoyed without preventing other vehicles on the highway from moving at their usual rate of speed. Commonwealth *v.* Temple, 14 Gray, 69. But under the English statute an intent to commit the act of obstruction was held necessary. Batting *v.* Bristol & Exeter Railw., 9 W. R. 271; s. c. 3 L. T. N. S. 665. And see Wilbrand *v.* Eighth Avenue Railw., 3 Bosworth, 314; McCarty *v.* State, 37 Miss. 411.

Under the statute 3 and 4 Victoria, c. 97, § 13, one may be convicted of a misdemeanor for obstructing the line of a railway, although the railway had not yet been opened for passenger traffic, and no engine or car had yet been con-

structed. Reg. v. Bradford, 8 Cox, C. C. 309. And see Roberts, v. Preston, 9 C. B. N. S. 208.

In an indictment for wilfully and maliciously obstructing a street railway company, in the use of its road, the actual enjoyment and use of the franchise by the company will authorize the jury to find its location lawful, there being no evidence to the contrary. And in such case it will not be necessary to show that the defendant was requested to remove from the track, and refused to do so, if the jury are satisfied from other evidence that the defendant's conduct, in obstructing the cars, was wilfully malicious. Commonwealth v. Hicks, 7 Allen, 573.

*CHAPTER XXXI.

TAXATION.

SECTION I.

Assessments upon Railway Works, and upon Stock, or Shares.

1. *Under English statutes company assessed for net profits in each parish.*
2. *This may be increased by the traffic or by smallness of repairs in the parish.*
3. *Depreciation of road by time to be taken into account.*
4. *Mode of estimating yearly net profits.*
5. *Rule stated in several of the American states.*
6. *Liability to taxation on railway stock same as other personal property.*

n. 15. *Right of legislature to exempt company or stock from taxation.*

7. *Railways not generally held liable to taxation as a fixture under general laws. Subject further discussed.*
8. *Such erections as are necessary to the use of a railway are not taxable separate from the road.*
9. *But erections of mere convenience, for profit, may be.*
10. *Or such as are without the limits of land allowed to be taken compulsorily.*
11. *As to taxation, capital given as a bonus is clearly capital.*
12. *Municipalities may tax real estate for improvements.*
13. *Generally called taxation, not eminent domain.*
14. *Recent case in New York.*

n. 34. *Power of courts to restrain excessive taxation seems to be outgrown, except in case of national stocks.*

§ 228. 1. The assessment of railways, in England, to the poor's rate, which is the chief parish rate there, is made upon the company, as an occupier of land, under the 43 Eliz., c. 2, which, by 6 & 7 Will. IV, c. 96, is required to be assessed upon the "net annual value."[1] And by 3 & 4 Vict. c. 89, re-enacted from time to time, the assessment is required to be "in respect of his ability, derived from the profits" of such occupancy of land, or other property. Under these statutes it was held, that a railway company was to be rated according to the value of the land, as increased by the line of railway and buildings.[2] And also that the company were properly assessed, for what a lessee could * afford to pay for the use of the railway, as net profits, after deducting all

[1] But the mere possession of running powers over a railway does not render the company having such powers liable to pay rates on the line to the parish in which it is situated. Reg. v. Midland Railw., 13 W. R. 202; s. c. 11 L. T. N. S. 303.

[2] Reg. v. Glamorganshire Canal Co., 3 El. & El. 186.

expenses of maintaining its operation.[3] And further, that such amount was to be distributed amongst the assessments of the several parishes, not in proportion to the length of the railway, but the actual earnings of each parish.[4]

2. And it makes no difference that some portion of the earnings * of one parish may be received at other points.[5] It is not what

[3] Real property, which is at the time wholly unproductive and incapable of being used productively, has no annual value. Attorney-General *v.* Sefton, 2 H. & C. 362. And a mill which is not worked on account of a depression in the cotton trade is to be rated at its annual value only as a storehouse for the machinery in it. Staley *v.* Castleton, 5 B. & S. 505.

[4] Reg. *v.* The London & Southwestern Railw., 2 Railw. C. 629; s. c. 1 Q. B. 558; Reg. *v.* Stockton & Darlington Railw., 8 L. T. N. S. 422. And where certain lands had by the Paving Act been excepted from liability to rate under the act, and afterwards part of the grounds so exempted were occupied by a railway company for the purposes of their road, it was held that such part was still exempt from the rate. Todd *v.* London & Southwestern Railw., 7 M. & G. 366. Where the sessions had assessed a railway, not according to its value as used for a railway, but according to the value of the adjoining lands, which was greater, the order was quashed, notwithstanding it appeared that the railway had displaced many buildings which had contributed largely to the rates. Reg. *v.* Manchester, South J. & A. Railw., 15 Q. B. 395, n. See Waterloo Bridge Co. *v.* Cull, 1 Ellis & Ellis, 213; 5 Jur. N. S. 464; s. c. in Exch. Cham. 1 Ellis & Ellis, 245; 5 Jur. N. S. 1288. By 21 and 22 Victoria, ch. 98, § 55, the occupier of any land covered with water, or used only as a railway constructed under the powers of any act of Parliament for public conveyance, is to be assessed to the district rate at one fourth only of its net annual value, as ascertained at the last poor rate. Under this provision it was held that a wet-dock was land covered with water; and that a railway which had been constructed by a company in connection with their docks, and joining a public railway and canal, under the powers of their private act, by which the company was bound to complete the railway for the accommodation of the public on payment of tolls, was a railway within the statute, although it was not constructed to carry passengers. Reg. *v.* Newport Dock Co., 31 L. J. M. C. 266; Newport Dock Co. *v.* Newport Board of Health, 2 Best & Smith, 708; Midland Railw. *v.* Birmingham, 13 L. T. N. S. 404.

Where by agreement between two railway companies forming together a continuous line it was stipulated that each should be at liberty to convey such of their passengers as had taken tickets for the entire distance over the line of the other, paying for each such passenger a certain sum by way of toll to the latter company, it was held that in estimating the gross receipts of one railway company in respect of portions of their line running through different parishes, the company was at liberty to deduct such sums as had been paid over to the other company in pursuance of this agreement. Reg. *v.* St. Pancras, 3 B. & S. 810; s. c. 9 Jur. N. S. 1102.

[5] Reg. *v.* Holme Reservoir, 10 W. R. 734. See also Great Eastern Railw. *v.* Haughley, Law Rep. 1 Q. B. 666.

is received in each parish, but what is earned there, which may be increased by there being more traffic there, or by the yearly outgoings and expense there being less.[6]

3. The company have a right to have the depreciation of the road by time taken into the account, to lessen the assessment.[7] And the cost of any particular portion of the road is not to be taken into the account in determining the assessment, except so far as it may conduce to the net earnings of that portion of the railway.[8]

4. By the English practice the Quarter Sessions are the final tribunal to estimate the yearly net profits of property so rated. And in making the assessment of the net profits of a railway, it was held they proceeded correctly in taking the gross receipts of the company in respect to their own railway, and making the following deductions: —

1st. Interest on the capital invested in the movable stock of the company.

2d. A percentage on the same capital, for tenant's profits and profits of trade.

3d. A percentage on the same sum, for annual depreciation of stock, beyond ordinary annual repairs.

4th. The actual annual expenses of the company.

5th. The fair annual value of stations and buildings, rated separately from the railway.

6th. An annual sum per mile, for the renewal and reproduction

[6] Hodges, 687; Rex *v.* Inhabitants of Barnes, 1 B. & Ad. 113; Rex *v.* Kingswinford, 7 B. & C. 236. The assessment for the stations and buildings is a separate assessment for the net rent of such buildings. See also London Northwestern Railw. *v.* Cannock, 9 L. T. N. S. 325; Reg. *v.* Stockton & Darlington Railw., 8 L. T. N. S. 422. The person receiving the money is the one to pay the tax on money received by railways for passenger traffic, under statute 5 & 6 Vict. ch. 79. Where trains were required to be run, at a fare of a penny a mile, under the approval of the board of trade, and such fares were exempted from taxation, it was held the exemption will not attach if the trains are run at the same rate, but without the approval of the board of trade. Great Western Railw. *v.* Attorney-General, Law Rep. 1 H. L. 1.

[7] Reg. *v.* London, Br. & South Coast Railw., 6 Railw. C. 440; s. c. 15 Q. B. 313; 3 Eng. L. & Eq. 329.

[8] Reg. *v.* Mile End Old Town, 10 Q. B. 208. The proper allowance for tenant's profits and interest on profits is entirely a question of fact. Sheffield United Gas Light Co. *v.* Sheffield, 4 Best & Smith, 135.

of the rails, sleepers, &c., and that these were all the deductions properly to be made.[9]

*7th. But where one railway company, by contract with another company, were to have the control of the trains and fares on the latter line, and were to pay a sum of money, which should raise their dividends upon their capital stock to three per cent, it was held that the payment made by the former company should not be

[9] Reg. *v.* Grand J. Railw., 4 Q. B. 18; Reg. *v.* Great Western Railw., 6 Q. B. 179; Same *v.* Same, 15 Q. B. 1085. In a recent case a company under an act of Parliament constructed a reservoir to supply water to mills situate on certain streams. They were authorized to raise money on the security of rates to be levied on the occupiers of such mills in proportion to the falls of water occupied by them. The rates to be levied were limited by the act, and were appropriated: first, to the current and ordinary annual expenses of the works not exceeding a certain sum; secondly, to maintaining the reservoirs; then, to paying the interest on sums borrowed under that and a former act; next, in setting apart a certain amount for a reserved fund; next, in paying incidental current expenses not covered by the sum first appropriated; and lastly, in adding the surplus to a reserve fund. The whole of the funds received were exhausted under the first three heads of appropriations. The water flowed from the reservoir into the natural course of the streams supplying the mills, nothing further having to be done to it by the company after it had left the reservoir. Some of the falls, in respect of which rates were payable, were situated within and some without the parish. It was held that the company had a beneficial occupation of the reservoir, in respect of which they were liable to be rated, and that, in determining the ratable value, they were not entitled to deduct the amount paid for interest on money borrowed; that the property was not exempted from rates by reason of the appropriation of its revenues; and that the sums received on account of falls situate without the parish should be taken into account as well as others. Reg. *v.* Holme Reservoirs, 10 W. R. 734. See also Reg. *v.* Tyne Improvement Commissioners, 6 L. T. N. S. 489; Sheffield United Gas Light Co. *v.* Sheffield, 4 B. & S. 135; s. c. 9 Jur. N. S. 623; Eastern Counties Railw. *v.* Great Amwell, 11 W. R. 394; s. c. *nom.* Reg. *v.* Eastern Counties Railw., 4 B. & S. 58; s. c. 9 Jur. N. S. 1339. In the last case it was held that "terminal charges" or deductions from the charges for carrying goods set apart as the earnings of the staff and appliances at the station where the goods are delivered, are to be considered as part of the general earnings of the line and not of the stations, and must be included in calculating the gross earnings and expenses of the line in a parish for the purpose of assessing the railway to the relief of the poor in such parish. Where a branch railway is worked in connection with the whole line, as an undistinguished part of it, the whole should be estimated together, and not the branch separately. Reg. *v.* Midland Railw., 15 Q. B. 313; s. c. 6 Railw. C. 464–477. And see London & Northwestern Railw. *v.* Cannock, 9 L. T. N. S. 325; Great E. Railw. *v.* Haughley, Law Rep. 1 Q. B. 666; s. c. 12 Jur. N. S. 596.

taken into the account in estimating the ratable value of the latter company.[10]

* 8th. But a rent, or sum in nature of rent, paid for the occupation of a railway, is not necessarily a criterion of its ratable value. The profits on a main line, derived by occupation of a branch, may be taken into account in estimating the ratable value of the branch, and the local profits only.[11]

5. In many of the American states railways are made liable to taxation as a part of the realty, including their whole line of road.[12] But this is defined in the several statutes, and the decisions will be of little force out of the state where made. But a brief reference to some of the more prominent points is here made.

In New York taxes are levied upon the value of the land and the erections and fixtures thereon, irrespective of the considerations whether the road is well or ill managed, or whether it is profitable to the stockholders or otherwise.[13]

[10] Reg. *v.* Newmarket Railw., 3 El. & Bl. 94; s. c. 25 Eng. L. & Eq. 138. But in Reg. *v.* Sherard, 33 L. J. M. C. 5, it was held that the sum paid by one railway company to another for the use of a part of its station must be taken into account in estimating the ratable profits of the latter company.

[11] Reg. *v.* The Southeastern Railw., 25 Eng. L. & Eq. 176. See also Hodges 686–737, where some valuable suggestions are found in regard to the detail of these assessments which we have not space to repeat here. And see State *v.* Illinois Central Railw., 27 Ill. 64.

[12] In Indiana it is held that a railway company should be taxed for its road as an entirety, including every thing in any way used by the company in running or operating it. But the real estate owned by a railway company or held by it in trust, and not used in running or operating the road, should be taxed in the same manner as that owned by a private individual. Toledo & Wabash Railw. *v.* Lafayette, 22 Ind. 262. And see Whitney *v.* Madison, 23 Ind. 331. See also Delaware & Hudson Canal Co. *v.* Commonwealth, 43 Penn. St. 227.

[13] Albany & Schenectady Railw. *v.* Osborn, 12 Barb. 223; Albany & West Stockbridge Railw. *v.* Canaan, 16 Barb. 244. Each tax district assesses that portion of the road within its jurisdiction. People *v.* Supervisors of Niagara, 4 Hill, 20. In regard to taxation of railways it has been well said that the only just basis for exercising it is that it be imposed upon profits. Paine *v.* Wright & The Indianapolis & Bellefontaine Railw., 6 McLean, 395. See also People *v.* Mayor of Brooklyn, 6 Barb. 209.

By a statute of New York, passed in 1857, the real estate of railway corporations is assessed "in the town or ward in which the same shall lie, in the same manner as the real estate of individuals." And assessments on the personal estate of railways shall be made by the assessors of the "town or ward in which their principal office is situated," but the taxes thereon "shall be divided and paid"

* The rule in Illinois seems to be much the same. The railway is held liable to taxation as real estate, situated within the county assessing the tax,[14] and a tax upon an undivided portion * of a

"to the collectors of the several towns, &c., through which the road shall pass, in proportion, as near as may be, to the length of the track in such towns, &c., as compared with the whole length."

This seems to be putting assessments upon the real estate of railway companies very much upon the basis of the English practice, except that the distribution among the several towns of the assessment for personal estate is to be made according to the length of track in each town; while in England the assessment upon real estate includes the plant, or rolling stock of the road, as a mere accessory to the profits, by which the road-bed and superstructure is rated. This seems more simple and just than to attempt a separate estimate of each, and the more recent decisions in this country certainly incline in that direction. *Post*, § 235, n. 21, 22, 23, 24.

[14] Sangamon & Morgan Railw. *v.* County of Morgan, 14 Ill. 163; State *v.* Illinois Central Railw., 27 Ill. 64; Mohawk & Hudson Railw. *v.* Clute, 4 Paige, 384. It has been held, that where the right to maintain actions in a county depends upon residence, the company might maintain an action in that county where their records were kept, and a large share of their business transacted, notwithstanding they might have another office in a different county where the residue of their business is done, and where the clerk and treasurer reside. Androscoggin & Kennebec Railw. *v.* Stevens, 28 Maine, 434; Bristol *v.* Chicago & Aurora Railw., 15 Ill. 436. See also Rhodes *v.* Salem Turnpike and Chelsea Bridge Corporation, 98 Mass. 95.

In a recent case, in the Supreme Court of Vermont, Conn. & Pass. Rivers Railw. *v.* Cooper, 30 Vt. 476, the question of the right of the plaintiffs to maintain an action in the county of Windsor (into which their road extended, but where they had no office or place of business except their ordinary way stations), on the ground of residence in that county, was discussed at very considerable length by the counsel and the court, and the conclusion arrived at was: —

That a railway company, for purposes of maintaining actions, or being taxed for personalty, in the place of residence, must be regarded as having its situs at some point upon its line (including branches), and that this could not ordinarily be extended beyond the place of its principal business office, at the point where its chief operations, under its charter, had their centre. That this could not in any view be extended to include merely way stations; and consequently the plaintiffs cannot be regarded as having any residence in the county of Windsor. This result is maintained, in the opinion of the court, to be the only conclusion to be drawn from the decisions upon the subject; and to have the support of convenience, analogy, and general acquiescence, both in regard to legislation and judicial construction. See People *ex rel.* Hudson River Railw. *v.* Peirce, 31 Barb. 138; Southwestern Railw. *v.* Paulk, 24 Ga. 356. In Garton *v.* Great Western Railw., Ellis, Bl. & Ellis, 836, it was held, that although the railway held half-yearly meetings at two points and elected half their board of directors from those resident near each place, yet, as all the general business of the company was transacted at one of the places where the secretary resided, and where

railway lying in different counties, including its furniture, is not legal. The personal property of the corporation is liable to taxation, if at all, at the residence of the owner, which, in such case, is considered to be the place of their principal office of business.[14]

The same rule seems to obtain in Rhode Island.[15]

orders were issued, that must be regarded as the only "principal office" of the company for the purpose of serving process under the English statute.

And in a late case in New Hampshire, it was held, that if a railway corporation is located in another state, and all its property is taxed in that state, to the corporation, on the same valuation and at the same rate as the property of an individual, a stockholder residing in this state is not liable to be taxed for his stock in the road. Smith *v.* Exeter, 37 N. H. 556. This point was not raised in the Pennsylvania cases cited *infra*, McKeen *v.* County of Northampton, and Whitesell *v.* County of Northampton, 49 Penn. St. 519, 526. And see Conwell *v.* Connersville, 15 Indiana, 150.

[15] Providence & Worcester Railroad *v.* Wright, 2 Rhode Island, 459. See also Louisville & Portland Canal Company *v.* Commonwealth, 7 B. Munroe, 160.

In a late case in the Supreme Court of Vermont (Thorpe *v.* The Rutland & Burlington Railw., 27 Vt. 140), a doubt is expressed in regard to the entire soundness of the principle of legislative exemptions of corporations from taxation. It may be sound, perhaps, within certain limits, and so far as it can be clearly shown to have formed an essential ingredient in the consideration which induces the corporators to accept their charter, and undertake the offices thereby created. If it were apparent, that without the exemption the company would not have accepted their charter, it might with great propriety be urged, that the indispensable condition of its existence should be held inviolable, even by the legislature.

And it is possible to attach some such importance to exemptions from *special* taxation. By this we do not mean a tax imposed upon the stock or property of a particular company, but upon a class of corporations, by themselves, as upon banks, or railways, which it is conceded may be taxed, as a class, to the limit of exhausting all their profits, and thus virtually, although indirectly, causing their destruction. An exemption from this kind of taxation, or, in other words, a provision in the charter of a corporation, that all taxes levied upon it shall be in common with the same amount of property of other persons throughout the state, would certainly be just, and ought to be held binding upon future legislatures, and could form no unreasonable abridgment of the state sovereignty.

It is this kind of exemption which the United States Supreme Court at first claimed, in regard to the agencies of the national government, as an indispensable quality of the paramount sovereignty accorded to that government within its appropriate sphere. McCulloch *v.* The State of Maryland, 4 Wheaton, 316.

Ch. J. *Marshall* says expressly, in concluding the opinion in that case, that the limitation there imposed upon the power of the States to tax the Bank of the United States, "does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax

* In some of the states the capital stock of a corporation is taxable to the company in the town where it keeps its principal business office.[16]

imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State."

Under this exception it was supposed that shareholders in the United States Bank were liable to taxation by the several States in common with other bank-stock owners. But it has been since held, that the owners of United States government stock were not liable to State taxation upon that stock. Weston *v.* The City of Charleston, 2 Peters, 449.

The distinction, however, between a special tax upon a corporation, its property, or even its capital, and a tax upon the income of shareholders derived from the stock, is a broad and obvious one, and would seem to mark the limit of exemptions of the property of corporations from taxation, without undue abridgment of legislative authority and of the essential elements of state sovereignty. But the cases already referred to show, that the right of legislative exemption has been carried further, in some cases, and such seem to be the decisions of the national tribunal, in the last resort. Gordon *v.* The Appeal Tax Court, 3 How. 133.

It would appear to be a very obvious necessity of the state, as well as of the national sovereignty, that the right to levy a tax upon income should exist, and remain perpetual and inviolable. Hence upon principle, it would seem, that the opinion of *Thompson*, J., in Weston *v.* The City of Charleston, in which he maintained, that the tax upon the income of the owner of United States stocks, was valid, and constitutional, and that of *Catron*, J., in State Bank of Ohio *v.* Knoop, sustained by the decisions of the State courts, then under consideration, and the opinion of *Parker*, Chief Justice, in Brewster *v.* Hough, 10 N. H. 138, maintaining the want of power, in a state legislature, to grant a perpetual exemption from taxation, was the sounder view of the law. And as we have elsewhere said, we should not be surprised to find hereafter this whole subject of the right of a state legislature, to exempt corporations, by their charter, from taxation, brought in question, or, at all events, limited to exemption from special taxation. But the law, at present, is probably otherwise.

It seems, too, that upon principle, an exemption of this character is not an

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[16] Mohawk & Hudson Railw. *v.* Clute, 4 Paige, 384. Where a question arises in which of two or more jurisdictions a party is taxable, he will be allowed to maintain a bill of interpleader against them, to determine the question. Thompson *v.* Ebetts, 1 Hopkins, Ch. 272. See also Bank of Utica *v.* Utica, 4 Paige, 399. The dividends of passenger railway companies are liable to city taxes. Railw. Company *v.* Philadelphia, 49 Penn. St. 251. And in Cornwell *v.* Town of Connersville, 15 Ind. 150, it was held that a corporation can be taxed, in the place where such corporation is located, only upon its corporate property as distinguished from the interests of the several stockholders, which were taxable in those places where they respectively resided. And see McKeen *v.* County of Northampton, 49 Penn. St. 519; Whitesell *v.* Same, ib. 526.

6. * But the owners of stock in railway companies are liable to taxation upon it, without reference to any tax imposed upon the company. And upon this ground it was decided that the company were not liable to taxation upon the track, or stations, unless specially so provided by statute, because this would be virtually double taxation.[17] The owner of stock is liable to * taxation, whether the corporation be in the state of his residence or not, and even where it is taxed in another state.[18] And where one

essential franchise of the corporation, and is therefore necessarily temporary in its nature, as much so as the grant of a power to regulate its own police, which could confessedly, at any time, be resumed by the State. Our views in regard to the distinction between the essential franchises of a corporation, and those which are merely incidental, the former of which are inviolable, even by act of legislation, and the latter merely temporary, and necessarily subject to the will of the legislature, are sufficiently explained in the opinion, in Thorpe *v.* The Rutland & Burlington Railw., *post*, § 232. In New Jersey, it has been held that a legislative grant of corporate franchises, privileges, and immunities must be construed in strict accordance with the objects and purposes intended. Any right, power, or privilege not expressly granted or necessarily implied, is understood to be excluded. If a corporation, created for a specific purpose and exempted from taxation, invest funds in property to be used for speculation for a direct profit, and not for the specific purposes contemplated by their charter and the objects promised by the corporators, such property, real or personal, is liable to taxation, although the ultimate appropriation of such profits may be to the object specified. The means employed must be consistent with and necessary to the attainment of the proposed object. State *v.* City of Elizabeth, 4 Dutcher, 103. See State Treasurer *v.* Somerville & Eastern Railw., 4 Dutcher, 21.

[17] Bangor & Piscataqua Railw. *v.* Harris, 21 Maine, 533. But in Cumberland Marine Railw. Co. *v.* Portland, 37 Maine, 444, this case is said to have been decided contrary to Rev. Stat. 1838, which expressly makes "improved lands taxable," *sed quære*. And in other states it is held, the state may lawfully tax both the stock and the road, as a fixture, or tax one when the other is exempted, by parity of reason. But see cases under note (18), which seem to take a different view. Illinois Central Railw. *v.* County of McLean, 17 Ill. 291, 296; Philadelphia, Wilmington, & Baltimore Railw. *v.* Bayless, 2 Gill, 355. In McKeen *v.* County of Northampton, 49 Penn. St. 519, it is held, that the taxing power, resting upon the mutual duties between State and citizen of protection and support, and extending over all the persons lawfully within the territory, and all the property that either followed such persons, or fell locally within the territorial limits of the State, was rightfully exercised over manufacturing stock owned by a citizen of Pennsylvania, though the corporation was a foreign one. And see also Whitesell *v.* County of Northampton, 49 Penn. St. 526; Cornwell *v.* Connersville, 15 Ind. 150.

[18] State *v.* Branin, 3 Zabriskie, 484; Easton Bridge *v.* Northampton, 9 Penn. St. 415; State *v.* Bently, 3 Zabriskie, 532; State *v.* Danser, id. 552; Great Bar-

becomes himself the lessee of the works of a company, and is liable to taxation upon its property, in the place of his residence, he is also liable to be taxed, in the same place, for the stock he owns in the same company.[19] Where a railway is required to pay into the state treasury a certain sum annually, from its "income," this is to be understood as its net income of that year, and where, in any year the net income is not sufficient to pay that sum, the company are not obliged to make up the deficiency, from the excess of other years.[20]

7. Under the general laws of different states, by which real estate is made liable to taxation, railways have not generally been held liable to taxation as a fixture, its stock being liable in the hands of the shareholders. But there are some exceptions to this practice. It has been held,[21] that it is competent for the legislature, by general law, to require all corporations organized in the state, to pay the state treasurer a tax upon the market value of their capital stock, above the value of their real estate and machinery taxable in the towns or cities where located. But such tax to the corporation will not exempt the shareholders from taxation on the amount of stock owned by them, as personal property held and owned by themselves personally.[22] But a street railway corporation is not taxable either upon general principles or under the Massachusetts statute, for horses and other personal property owned and used in the prosecution of its business, such property representing the capital of the corporation.[23]

8. In Pennsylvania, in Lehigh Navigation Co. *v.* Northampton

rington *v.* Berkshire County, 16 Pick. 572. But see Gordon *v.* Baltimore, 5 Gill, 231, 236, and 12 Gill & J. 117. And in such cases the value of the real estate of the corporation is not to be deducted in estimating the value of the stock for which the owner is taxable in the place of his residence. Dwight *v.* Boston, 12 Allen, 316.

[19] Stein *v.* Mobile, 24 Ala. 591; Providence Bank *v.* Billings, 4 Pet. (U. S.) 514; State *v.* Tunis, 3 Zabriskie, 546. In this case it is held, the shareholder is liable to taxation upon his shares, according to their fair market value, and not at the nominal par value.

[20] Opinion of the judges in the matter of the Western Railw., 5 Met. 596.

[21] Commonwealth *v.* Lowell Gas Light Co., 12 Allen, 75. Same *v.* Hamilton Manuf. Co., id. 298.

[22] Bridgeport *v.* Bishop, 33 Conn. 187.

[23] Middlesex Railw. *v.* Charlestown, 8 Allen, 330. A railway company is not taxable for the land embraced in its location, under Mass. Statutes, 1855, ch. 240. Charlestown *v.* Mid. Co., 1 Allen, 199.

County,[24] it was held, that the toll-houses and offices of a canal company, are such a necessary incident of the corporation and its functions, that they cannot be assessed and taxed as separate real estate. And in a later case,[25] it was held, that such property as is appurtenant and indispensable to the construction and operation of a railway, as water-stations and depots, and probably offices, and oil-houses, and car and engine-houses, and all such erections as may fairly be regarded as necessary to the * convenient use of the road, are to be held exempt from taxation, as forming a part of the incorporeal estate of the corporation.[26]

9. But it was also said in this last case,[27] that those erections, which are only indispensable to the making of profits, such as warehouses, coal-lots, coal-shutes, machine-shops, wood-yards, and what does not form part of the road, are liable to taxation.

10. In a recent case in Vermont[28] it was held, that where the charter of a railway exempted its property perpetually from taxation, this did not extend to lands and tenements which the company had acquired for convenience and which were without the limits of the six rods, which, by their charter, they were allowed to take compulsorily, and were in the occupancy of tenants or employees of the company.[29]

11. Where a railway company by the express provisions of its charter are liable to a defined tax upon all its capital paid in, and upon all its loans for the purpose of constructing the road, it was held that $300,000 of the capital stock which was given as a bonus

[24] 8 Watts & Serg. 334.

[25] Railroad *v.* Berks County, *et vice versa*, 6 Penn. St. 70; s. c. 2 Am. Railw. C. 306.

[26] See Carbon Iron Co. *v.* Carbon County, 39 Penn. St. 251.

[27] Railroad *v.* Berks County, *supra*.

[28] Vermont Central Railw. *v.* Burlington, 28 Vt. 193.

[29] And in Carbon Iron Co. *v.* Carbon County, 39 Penn. St. 251, it was held that corporations are not exempt from taxation as such, but only the public works held by them as public works, with the necessary appurtenances. Lands held by corporations for private purposes are taxable as the lands of individuals are, unless expressly exempted. The tax for State purposes, payable at the auditor-general's office, is a tax for the corporate franchises, and is not intended as an exemption from ordinary taxation. Ib. In Jefferson, &c. Bank *v.* Skelly, 1 Black (U. S.), 436, it is held by the Supreme Court of the United States that a state is not to be deemed to have abridged or surrendered the right of taxation of a corporation, unless such abridgment or surrender be expressed in the charter in terms too clear for mistake.

to the original purchasers of the road of the state, $183,000 discount, or loss, on the sale of the bonds of the company, and near half a million dollars of the bonds of the company exchanged for the bonds of another company, but which had never been used by the company, were all liable to taxation. The first, as forming a portion of the capital stock of the company, and on the ground that it made no difference that the money had never been actually paid in, since the shares had been given out upon consideration, and were thus beyond the control of * the company, and entitled to the profits of the company as such, like any other portion of the capital stock. The second, upon the ground that the bonds issued showed the amount of the loan. The third, upon the ground that such an exchange of bonds must be considered as a loan to the company.[30]

12. The power of municipal corporations to make special assessments upon abutters for the purpose of improving the streets, where such estates are peculiarly and specially benefited, and where the burden is professedly apportioned according to benefit, is most unquestionable.[31]

13. This question has been a good deal discussed in the different states within the last few years. The principal point of difference has been to determine where taxation ends, and the tenure by the right of eminent domain begins. Since the decision of the case of The People *v.* The Mayor of Brooklyn,[32] the courts seem very composedly to have sunk down into the quiet conviction that it is all nothing but taxation, and that where the municipal authorities assess the land to its full value for the purpose of assumed improvements, more or less remote from the land, and without regard to the extent of the ratio of equalization, it is still nothing but taxation.[33]

14. The question is very carefully considered by *Sawyer*, J., in the last case, and the authorities carefully collected and arranged. As the full discussion of the question hardly comports with our plan, we must content ourselves with a mere reference to some of the leading cases upon the point.[34]

[30] People *v.* Michigan Southern & Northern Indiana Railw., 4 Mich. 398.

[31] Hill *v.* Higdon, 5 Ohio St. 243.

[32] 4 N. Y. 420.

[33] Emery *v.* San Francisco Gas Co., 28 Cal. 345, and cases cited by the court.

[34] The doctrine above stated is more or less directly affirmed in Brewster *v.*

*SECTION II.

Legislative Exemption from Taxation.

1. *General nature of such exemption stated.*
2. *General exemption from taxation includes stock.*
3. *Qualifications of the general rule.*
4. *Exemption of the capital stock includes all property of the company necessary to its business.*
5. *Exemption, with exception, includes all modes of taxation but that one.*
6. *Union of companies where some are exempted from taxation and some not.*
7. *Construction of a qualified exemption from taxation.*
8. *Such exemptions declared unconstitutional.*
9. *Where railway works are taxed indirectly they cannot be taxed directly also.*
10. *Qualified exemptions held valid and inviolable.*
11. *Exemptions from taxation should be held temporary, where they will bear that construction.*
12. *Land taken by right of eminent domain exempt.*
13. *The distinction between public and private business corporations.*
14. *The distinction between structures within and without the road-grant clearly invalid.*
15. *Public corporations, as to property used for public purposes, exempt from taxation.*

§ 229. 1. The grounds of exemption from taxation in regard to property seem to be of three kinds, more or less identical, perhaps,

Syracuse, 19 N. Y. 116, 118; N. I. Railw. Co. *v.* Connelly, 10 Ohio N. S. 162; Municipality No. 2 *v.* White, 9 Lou. Ann. 452; Mayor of Baltimore *v.* Green Mount Cemetery Co., 7 Md. 536; Nichols *v.* Bridgeport, 23 Conn. 206; State *v.* City of Newark, 3 Dutcher, 191. And in the case of Dorgan *v.* City of Boston, 12 Allen, 223, the court seem to have considered that an express constitutional provision that all taxes and assessments shall be equal and proportional, will not operate to limit the power of the legislature in regard to assessments of this character.

The truth seems to be, however unwelcome it may sound, in a distinct announcement, that the love of improvement and the consequent necessity of taxation, have outgrown the power and control of the courts in the country, except, perhaps, in regard to the national stocks, which have a kind of charmed exemption by reason of the popular sacredness of the cause in which they originated, and, in consequence of such result, nothing remains but to find the best reasons we can for unlimited and absolutely destructive taxation, since that is a necessity which no human power can resist, provided only that it be imposed with reasonable wisdom and discretion.

It is not a little painful to reflect upon the possible results of such an overgrown and imperious power of taxation. But it rests upon the same foundation that all power now rests upon, — an unreasoning public opinion that will brook no contradiction or delay, and which, as it was never reasoned up, cannot of course be reasoned down. We trust a time may come when this fever will abate, but we can scarcely expect it in the present generation.

in principle. 1st. Where property is conveyed directly by the state, upon the express condition that it shall be for ever afterwards exempt from all taxation. In this case the exemption tends directly to enhance the price of the thing, and there is a most obvious equity in maintaining the perpetual obligation and * inviolability of the condition. Of this character was the exemption claimed and sustained in the case of The State of New Jersey *v.* Wilson,[1] and distinctly recognized in many subsequent cases, which more properly apply to other general divisions of the subject. 2d. It is held in a considerable number of cases in the United States Supreme Court,[2] that where a corporation is chartered by the state legislature, not only its property but its capital in the hands of shareholders may by an express grant be perpetually exempted from taxation. 1. When a distinct bonus or price is paid to the state for the charter, including the exemption; and 2. Even when no such specific price is paid, the exemption may be sustained upon the mere ground of the company assuming to perform certain public duties. This doctrine is distinctly held in Gordon *v.* The Appeal Tax Court, and in The State Bank *v.* Knoop, and in the Ohio Life Insurance Company *v.* Debolt.[2] The cases in the several states where this rule is recognized are numerous, but as the binding force and inviolability of this exemption depends upon the applicability of that provision in the United States Constitution prohibiting the state legislatures from passing any law impairing the obligation of contracts, the only authoritative exposition of the subject must be sought in the ultimate decision of the national tribunals. For unless we adopt this view there is of course no path open to any thing approaching uniformity of decision upon a subject of such vital importance. We shall, therefore, only refer to such decisions of the state courts as propose to limit or qualify the doctrine.

2. The cases in the United States Supreme Court regard a general exemption of the property of a corporation from taxation as exempting its stock in the hands of the stockholders.[3]

3. But some of the state courts have construed such general exemption as not extending to property of the corporation, which

[1] 7 Cranch, 164. See also Fletcher *v.* Peck, 6 Cranch, 87.

[2] 3 Howard, 133; 16 Howard, 386; Id. 416; Jefferson, &c., Bank *v.* Skelley, 1 Black (U. S.), 436.

[3] Gordon *v.* The Appeal Tax Court, 3 Howard, 133.

was a mere convenience in the conduct of their business, but not essential.[4] And it has been held in some cases that a general * exemption of a railway from taxation does not extend to the holder of their bonds.[5] And where a corporation is made liable to a specific tax whenever their net profits shall reach a certain point, and exempted from all other taxes, this is a present exemption from all other modes of taxation except that specified, and that only attaches when the condition occurs.[6] A general exemption of the property of a corporation from taxation, but making the stock liable to taxation in the hands of stockholders, will exempt its surplus funds and its real estate from taxation.[7]

4. Exemption of the capital stock has been held to exempt property of the company necessary to carry on the business.[8]

5. In State *v.* Berry,[9] it is held, that where the charter of a railway was subjected in terms to certain specified taxation, with a general exemption "from all further or other tax or imposts," that this exempted the company perpetually from all other taxation, and this is the doctrine laid down by the majority of the United States Supreme Court, in State Bank *v.* Knoop.[10]

6. And where a corporation, enjoying an exemption from taxation, is united with other corporations not having such exemption by a legislative act of consolidation; this does not extend the exemption beyond the first corporation, and the property of the other corporations, being the road of a railway, is still liable to taxation.[11]

[4] State *v.* Mansfield, 3 New Jersey, 510; Gardner *v.* State, 1 id. 557; Worcester *v.* Western Railw., 4. Met. 564; Meeting-House Society in Lowell *v.* Lowell, 1 Met. 538; Lehigh Co. *v.* Northampton, 8 W. & S. 334; Rome Railway *v.* Rome, 14 Ga. 275; Railway *v.* Berks Co., 6 Penn. St. 70; Carbon Iron Co. *v.* Carbon County, 39 Penn. St. 251; Lackawanna Iron Co. *v.* Luzerne County, 42 Penn. St. 424. But see Neustadt *v.* Illinois Central Railw., 31 Illinois. 484, where the principle of exemption is carried further than the state courts have generally been willing to extend it, though not probably further than the case required.

[5] State *v.* Branin, 3 Zab. 484. But see State *v.* Ross, id. 517.

[6] State *v.* Minton, 3 Zab. 529.

[7] State *v.* Tunis, 3 Zab. 546.

[8] The Rome Railw. *v.* Rome, 14 Ga. 275.

[9] 2 Harrison, 80; New York & Erie Railw. *v.* Sabin, 26 Penn. St. 242, where the exemption is implied from the company being subjected to taxes in a specific mode. And the same point is maintained in the subsequent case of Iron City Bank *v.* Pittsburg, 37 Penn. St. 340.

[10] 16 Howard, 386.

[11] Philadelphia & Wil. Railw. *v.* The State of Maryland, 10 How. 376. See also Baltimore *v.* Bal. & Ohio Railw., 6 Gill, 288.

*7. And where a statute provided that the shares of the capital stock of a certain railway should be exempt from taxation, "except that portion of the permanent and fixed works of the company within the state of Maryland," and that, in regard to that section, no greater tax should be at any time levied than in proportion to the general taxes throughout the state at the same time; it was held, that such portion of the fixed works of the company as was within the state of Maryland remained subject to general taxation for state and county taxes.[12]

8. In a very recent and important case, Pennsylvania Canal Commissioners *v.* The Pennsylvania Railway Company,[13] where the cases are very extensively and thoroughly examined by *Lewis*, Ch. J., the following propositions are maintained in the decision: —

1. A state legislature, in the absence of any express constitutional authority, has no power to sell, surrender, alienate, or abridge any of the rights of sovereignty, such as the right of taxation, so as to bind future legislatures; and any contract to that effect is void.

2. So much of the act of the legislature of Pennsylvania, authorizing the sale of the Main Line of the Public Improvements of that state, as provides, that if the Pennsylvania Railway Company shall become the purchaser, they shall pay, in addition to the purchase-money at which the Main Line may be struck down, the sum of $1,500,000, in consideration whereof the said railway company and the Harrisburg Railway Company shall be discharged by the Commonwealth "*for ever* from the payment of all tonnage taxes, and all other taxes whatever," "except for school, city, county, borough, and township taxes," is *declared unconstitutional and void; and an injunction was granted to prevent the same forming part of the terms of the sale.

9. Where a railway in another state is allowed, by act of the

[12] Philadelphia, Wilm., & Balt. Railw. *v.* Bayless, 2 Gill, 355.

[13] 5 Law Reg. 623. The cases chiefly relied upon by the court, in this case, as having established a similar doctrine in other States, are those in Ohio, which were reversed by the Supreme Court of the United States. They are the following: State Bank *v.* Knoop, 16 How. 386; Ohio Life Ins. Co. *v.* Debolt, 16 How. 426; s. c. 1 Ohio N. S. 563. The same principle is maintained in Bank of Toledo *v.* City of Toledo, 1 Ohio N. S. 623, and in Mechanics' & Traders' Bank *v.* Debolt, id. 591; s. c. reversed in U. S. Supreme Court, in error, 18 How. 380. Same *v.* Thomas, id. 386; The Milan & Rut. Plank-Road Co. *v.* Husted, 3 Ohio N. S. 578; Norwalk Plank-Road *v.* Same, id. 586; Dodge *v.* Woolsey, 18 How. 331.

legislature, to locate part of its road in the State of Pennsylvania, on condition of paying to the state a certain sum annually, and also a corporation tax on so much of its capital stock as should be equal to the cost of construction of that portion of the road and its appurtenances within the state; and the expense of machine shops, foundries, passenger and freight houses, which where used to carry on the business of the company had been charged to the cost of construction, it was held they were not subject to assessment and taxation for state and county purposes.[14]

10. In a recent case before the United States Circuit Court in Ohio, it is held, that a state law which declares "that a bank shall pay a tax of six per cent upon its dividends, after deducting accustomed expenses and losses, in lieu of all taxation whatever," is a contract the obligation of which the legislature cannot impair.[15]

11. It is unquestionable that the legislature may, in the charter of a corporation, fix the rate of taxation for the time being, and subsequently repeal the provision, and subject the company to a higher rate of taxation; and unless exclusive terms are used in regard to a provision limiting the rate of taxation, it will be regarded as temporary.[16]

*12. There is one class of exemptions from taxation prevailing

[14] New York & Erie Railw. *v.* Sabin, 26 Penn. St. 242. But the principle of this case would seem to be somewhat brought into question by the late case of Lackawanna Iron Co. *v.* Luzerne County, 42 Penn. St. 424, though the two decisions are not, strictly speaking, irreconcilable. It is here declared that the houses, lands, and other property of a corporation held for its private purposes, are not exempt from taxation because purchased with its capital stock upon which it is obliged to pay a tax to the Commonwealth, unless specially exempted in the charter. The court admit that the public works of a corporation, used as such, with their necessary appurtenances, are exempt from taxation; but declare that all other property, real and personal, held by them, is liable to assessment and taxation for customary purposes, in the same manner as if held by individuals. Lackawanna Iron Co. *v.* Luzerne County, 42 Penn. St. 424.

[15] Woolsey *v.* Dodge, 6 McLean, 142. This decision is based upon those of the Supreme Court of the United States upon the same subject, and that those decisions are of binding authority upon all other tribunals in the republic. But the rule will not apply where the exemption from taxation is created in the charter of corporations subject to future amendments or repeal by the legislature. In such cases the legislature may repeal or modify the exemption from taxations. Commonwealth *v.* Fayette County Railway, 55 Penn. St. 452.

[16] Ohio Trust Company *v.* Debolt, 16 How. (U. S.) 416; Easton Bank *v.* Commonwealth, 10 Penn. St. 442; Christ Church *v.* Philadelphia, 24 Howard (U. S.), 300. In Eversfield *v.* Mid-Sussex Railw., 3 De G. & J. 286; s. c. 5 Jur.

in some of the states which operates rather unjustly in some cases and unequally in others. We refer to the exemption of such property from taxation as the legislature have appropriated to public use under the right of eminent domain. This will include town-houses, school-houses, and probably land and buildings appropriated to the use of supplying water to the inhabitants of towns and cities, and some others of a similar character.[17]

13. And the same rule has been extended to a private railway corporation;[18] but, as it seems to us, without sufficiently regarding the distinction, in this respect, between a public municipal corporation, all of whose objects and purposes are public, and wholly detached from all considerations of profit or business, and a merely business corporation, whose leading purpose is to derive profit from the use of land and erections thereon. In the former case it might well be said there was no more propriety in levying a tax upon the property of the corporation than upon that of a charitable or religious corporation, like a school or hospital or church; but in the latter case there seems to be no more reason to exempt the property of a business corporation, like a railway, from taxation, because it is allowed to be taken under the right of eminent domain, than if it were acquired by purchase in the ordinary mode.

14. And the distinction which is made in the case of railways between structures within the limits of the road-grant and those outside of those limits, although equally important for the business of the company, shows that the exemption stands on no sound principle. For if so it would scarcely be necessary to hold that a car house or a passenger station, so far as situated within the limits of the road-grant, was exempt from taxation, but if *situated without they would not be, thus necessitating the division of the same building, when used for the same purposes.[18]

15. The proper distinction seems to be, that such public corporations as exist exclusively for public purposes, and not for business

N. S. 776, it was held by the Lords Justices, in the Court of Chancery Appeal, that acts of Parliament authorizing the construction of public undertakings are to be construed strictly, with reference to the rights of those who are authorized to make them.

[17] Wayland *v.* County Commissioners of Middlesex, 4 Gray, 500.

[18] Worcester *v.* The Western Railw. Corporation, 4 Met. 564; Boston & Maine Railw. *v.* Cambridge, 8 Cush. 237.

* 395, 396

purposes of profit and gain, are exempt from taxation upon such property both real and personal as is fairly necessary for carrying forward their business. But such property as is owned by such corporations and applied to ordinary business purposes is not thus exempt.[19]

SECTION III.

Rights of Towns and Counties to subscribe for Railway Stock.

1. *Such subscriptions held valid if authorized by legislature. Extent of legislative omnipotence discussed.*
2. *Such subscriptions, in another state or province, held valid.*
3. *Lateral railway acts in Pennsylvania constitutional.*
4, and n. 2. *Some courts and judges have dissented from the general view.*
5. *Such acts have received a very strict construction.*

n. 1. *Cases reviewed.*

6. *Railways passing through must be regarded as leading to a city.*
7. *The national tribunals may enforce their judgments against municipalities by mandamus.*

§ 230. 1. It has been considered that a railway is so far in the nature of an improved highway, that the legislature may empower towns and counties to subscribe for stock in such companies whose roads pass through such towns or counties, and even where they tend to increase the business of roads which do pass through any portion of the territory of such towns or counties.[1] * And subscrip-

[19] Meeting-House in Lowell *v.* Lowell, 1 Met. 538.

[1] Louisville & Nashville Railw. *v.* Davidson Co. Ct., 1 Sneed, 637; Slack *v.* Maysville & Lexington Railw., 13 B. Monr. 1, 26; Goddin *v.* Crump, 8 Leigh, 120; Penn *v.* McWilliams, 1 Jones, 61; Shaw *v.* Dennis, 5 Gilman, 405; Cincin., Wilming., & Zanesv. Railw. *v.* Comm. of Cl. County, 1 Ohio N. S. 77; People *v.* Mayor of Brooklyn, 4 N. Y. 419; Steubenville & Indiana Railw. *v.* Tr. of North Township, 1 Ohio N. S. 105; Sharpless *v.* The Mayor of Philadelphia, 21 Penn. St. 147; Moers *v.* The City of Reading, 21 Penn. St. 188; Bridgeport *v.* The Housatonic Railw., 15 Conn. 475; Stein *v.* The City of Mobile, 24 Ala. 591; Covington & Lexington Railw. *v.* Kenton Co. Ct., 12 B. Monr. 144; Cass *v.* Dillon, 2 Ohio N. S. 607; Talbot *v.* Dent, 9 B. Monr. 526; Nichol *v.* Nashville, 9 Humph. 252; Ryder *v.* The Alton & Sangamon Railw., 13 Ill. 516; Justices of Clk. Co. Ct. *v.* P., W. & K. River Turnpike Co., 11 B. Monr. 145; New O., Op., & G. W. Railw. *v.* Succession of John McDonough, 8 Louis. Ann. 341; Strickland *v.* Mississippi Railw., cited in 21 Miss. 209; Dubuque Co. *v.* Dubuque & Pacific Railw., 4 Green, 1. But this case is overruled in Stokes *et al. v.* The County of Scott, 10 Iowa, 166, and in State of Iowa *v.* The County of Wapello, 13 Iowa, 388. It is not now important to discuss the principle of these conflicting decisions, since the tide of judicial opinion is almost all in one

tions made by towns or cities, to the stock of railways, without any special *act of legislation, have been held valid if confirmed by subsequent legislative sanction.[2]

direction and not in concurrence with the latter determination. For ourselves, we are free to confess that we never could comprehend the basis upon which so

[2] Bridgeport v. Housatonic Railw., 15 Conn. 475. The decisions in the several States seem all to have been in favor of the power of the legislature to build railways, at the public expense, of which there is perhaps no great question, for it seems to be a species of internal improvement, or intercommunication, which is, in a measure, indispensable to public interests, and public functions, in many ways.

The right, too, of the United States to do, or to aid in doing, the same, for purposes of conveying the mails, the army and its material, and for other public purposes, seems now to be almost universally conceded.

But, in regard to the power of the legislature to empower municipal corporations to subscribe for railway stock, there has been more controversy. The dissenting opinions of some of the judges, upon this question, where the majority of the court have maintained the validity of such subscriptions, would appear to have the advantage of the argument, especially where it has been attempted to impose a burden upon municipal corporations for the erection of railways beyond their territorial limits, although incidentally affecting their pecuniary interests, by way of business. The fallacy in the argument by which the leading opinions have been attempted to be maintained, if there be any, seems to consist in assuming that corporate interests of municipal corporations extend to every thing affecting their general wealth and business prosperity. Whereas, in truth, we are compelled to limit such interests at a point far short of this. Every thing which is practically indispensable to the security of life and property, or to the successful pursuit of business, and to the furtherance of public improvement and enterprise, and which is strictly within the territorial limits of the corporation, is, undoubtedly, to be fairly regarded as of municipal interest and concern.

But when we go beyond this, and include every improvement and public enterprise which centres in such municipality, there seems to be serious difficulty in fixing any just limits to the public burden which such corporations shall impose upon its members by the consent of the legislature, which is ordinarily no sure barrier against unjust taxation for the fostering and support of public works, in which the majority of the citizens of a district or State may already be embarked. These and similar considerations have with us created such distrust of the justice and legality of these municipal subscriptions for railway stock, that, if the question were altogether new, we should entertain great doubts and serious hesitation in regard to the practice coming appropriately within the range of municipal powers and duties. It seems to us, that if these public works require public patronage, it would more appropriately come from the State than from the municipalities, which are created for limited purposes, and with no appropriate facilities for the management of pecuniary investments in such extended enterprises. But the weight of authority is all in one direction, and it is now too late

These questions seem now to be placed completely at rest, as far as the validity of the statutes of state legislatures authorizing

many able jurists in this country have professed to perceive clearly the reasons for giving municipal corporations the power to become stockholders in railway

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to bring the matter into serious debate, certainly, until a larger experience of the impediments attending the management of investments in railway companies by municipal corporations. The distinction between the case of building a railway, leading into a city, which only incidentally affects the business interests of the city, and the case of building an extensive aqueduct for the supply of water to the inhabitants of a city or town, and for nothing else, is too obvious to require explanation.

In a late Pennsylvania case, it appeared that by an act of assembly, passed April 4th, 1837, the Pittsburg, Kittaning, and Warren Railroad was incorporated, and under it any incorporated town, city, or borough had authority to subscribe for the stock as fully as any individual could; the charter was to be null and void if the road was not commenced within five years, and completed within ten years from the passage of the act. Before the expiration of that time a supplemental act (March 16th, 1847) was passed, extending the time for the commencement to June 1st, 1852, and for completion to June 1st, 1862. By act of April 15, 1851, these periods were each extended five years more. By act of April 14, 1852, the name of the road was changed to the Alleghany Valley Railroad Co., and certain counties were authorized to subscribe for its stock, the counties and cities subscribing to pay their subscriptions by transferring stocks which they held in other companies, and the same act removed the limitations upon the city debts of the cities of Pittsburg and Alleghany. The city of Pittsburg, by ordinance of May 7th, 1852, subscribed for eight thousand shares, and issued bonds in payment of its subscription. On application by a holder of one of these bonds for mandamus to compel the payment of interest, &c., an answer was filed denying the right of the city to subscribe or to give bonds in payment of subscription. Held, that the right to subscribe under the act of 1837 did not expire in consequence of the failure to commence and complete the work within the time limited, for it was in the power of the legislature to waive the privilege reserved to the State to resume the franchises, which was done by the supplemental acts extending the time within which a company might be formed to accept these franchises, the original neither having been withdrawn, nor, after its acceptance by the company, lost by non-user; that the change by the legislature of the name of the railroad company did not affect its identity, for no other company was ever organized under the original act; nor, when the act of 1852 relieved the company from the duty of fixing the *termini* of their road at certain points named in the act, could a subscription made afterwards be invalidated because the *termini* had been changed. It was also held that the power to subscribe included the power to incur a debt and give evidence of it. The city could subscribe "as fully as an individual," and as an individual, by agreement with the company, could give his bond in payment for his subscription, so could the city. A municipal corporation may give its bonds for a legal and authorized debt under its general corporate powers; the power to execute and issue bonds, &c., be-

towns, cities, counties, and other similar corporations, to subscribe to the capital stock of railways, is concerned. The question of

companies. We have always felt that it was one of those cases in jurisprudence where the wish was father to the thought. See Griffith *v.* Comm. of Crawd. Co., 20 Ohio, 609, where *Spaulding*, J., assumes that, under the Ohio constitution, prohibiting the State from giving or loaning their credit "to, or in aid of, any individual, or association, or corporation whatever, and from becoming a joint owner or stockholder, in any company or association, in the State or elsewhere, formed for any purpose whatever," they cannot authorize a county, by a vote of the majority of its citizens, to subscribe for stock in a railway. But the question did not necessarily arise in the case, it having been decided upon other grounds. See also Penn. Railw. *v.* City of Philadelphia, 47 Penn. St. 189; Stokes *v.* County of Scott, 10 Iowa, 166; Taylor *v.* Newbern, 2 Jones, Eq. (N. C.) 141; City of St. Louis *v.* Alexander, 23 Mo. 483. The question was here held properly referable to the voters of the district, making the subscription, by the act of the legislature. The legality of such subscriptions seems to be recognized by two recent cases in Louisiana. V., S., & Texas Railw. *v.* Parish of Ouachita, 11 Louis. Ann. 649; Parker *v.* Scogin, id. 629. It is maintained in Maine, Augusta Bank *v.* Augusta, 49 Maine, 507.

In a case in the Circuit Court of the United States, for the District of Indiana, before Mr. Justice *McLean*, after the most elaborate discussion upon the point of the competency of counties, by legislative permission, to make subscriptions for building railways, passing through such counties, and to issue bonds with coupons, for the amount of such subscriptions, it seems to have been held, without hesitation, that such bonds were valid and binding upon the counties.

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longs to all corporations, and is inseparable from their corporate existence; it is for this they have a corporate seal. The rule that grants to a corporation are to be strictly construed is no reason for stripping a power of its usual and necessary incidents. A municipal bond for the stock of a railway company, if invalid, is not so because the municipality has no power to issue bonds, but because such a subscription is outside of their powers; but when the legislature has authorized such a subscription, it becomes a debt, like any other, and may be secured and evidenced in the same way. Consequently the city had power to make this subscription, and the bonds were lawfully issued. Commonwealth *v.* Councils of Pittsburg, 41 Penn. St. 278. See also Clark *v.* City of Des Moines, 5 Am. Law Reg. N. S. 146. And in Illinois it was held, that where county bonds, to aid in the construction of a railway, have been issued in pursuance of an election held without warrant of law, as where it has been ordered by a person or tribunal having no such authority, they are absolutely void. But where the election has been properly authorized, and there has been informality in the manner of submitting the question to the people, such as submitting two propositions as to aiding two separate roads, at a single vote, the bonds may be rendered valid in the hands of an innocent holder, by the acquiescence of the people and their subsequent ratification by the county, in levying a tax and paying interest upon them. Clarke *v.* Supervisors of Hancock County, 27 Ill. 305.

expediency and even of legality is still discussed as a speculative inquiry, and occasionally we notice a feeble judicial remonstrance

In this case the question of the subscription was submitted to the voters of the county. 9 Am. Railw. Times, June 18, 1857. See also Cotton v. County Comm., 6, Florida, 611; Slack v. Maysville & Lexington Railw., 13 B. Monr. 1; Cass v. Dillon, 2 Ohio N. S. 607; Thompson v. Kelly, id. 647.

In Fosdick v. Village of Perrysburg, 14 Ohio N. S. 472, it was held, following Cass v. Dillon, 2 id. 607, that special acts, authorizing certain municipalities to subscribe for stock and issue bonds in aid of certain railways, were not abrogated either by subsequent changes in the constitution or by the subsequent repeal of all acts for the organization or government of municipal corporations; nor did a limitation of the taxing power for the payment of interest on such bonds remove the obligation to impose sufficient taxes to pay the interest on bonds issued under such special acts though for this purpose it should be necessary to exceed the limitation subsequently fixed. And a slight misnomer of the municipality issuing such bonds does not affect their legality. The general question of the construction of legislative acts is here ably discussed. And see Commissioners of Knox County v. Nichols, 14 Ohio N. S. 260. And slight misnomers and variations from directory provisions were also disregarded in Maddox v. Graham, 2 Met. (Ky.) 56. In Evansville, &c. Railw. v. Evansville, 15 Ind. 395, suit was brought against the City of Evansville upon a subscription to the stock of the railroad company. The contract of subscription was executed on behalf of the city by its mayor, purported to be made in pursuance of an order of the common council, and was conditioned: 1. That the company should receive the bonds of the city at par in payment of the subscription; 2. That the bonds thus issued were not to be convertible into stock, and were to be delivered concurrently with the delivery of the certificates of stock; 3. That said certificates of stock should bear interest at the rate of seven per centum until the completion of the road to Indianapolis; 4. That the city might issue certificates for all taxes collected to pay the interest on said bonds, and that such certificates should be convertible into stock upon presentation by the holders in sums of fifty dollars, which should bear interest until the road was completed to Indianapolis. It was averred in the complaint that one hundred thousand dollars of said bonds were issued by the city, and that the city had failed on demand to deliver the residue of said bonds, and thereby became liable to pay the amount thereof in money. By the charter of the city, the common council was authorized to take stock in any company chartered for the purpose of making roads to said city, provided that no stock should be subscribed for or taken, unless on the petition of two thirds of the residents, being freeholders, distinctly setting forth the company in which stock should be taken, and the number and amount of shares to be subscribed for, and that in all cases where such stock was taken, the common council should have authority to borrow money and to lay and collect a tax on real estate, to pay for such stock. The court held, that a railway is such a road as is embraced within the terms of this charter; that the common council would have no power at all to subscribe in the absence of the petition provided for; but when once the power is conferred, the manner of exercising it, and the time and mode of payment are left wholly to their discretion. That

in the courts against extremes. But the tide rolls on with the general approbation, and the only hope now is to be able to fix such limits to railway extension, by means of municipal aid, that the entire property of the country may not be thrown into public and official administration by means of the unlimited power of extension of taxation. In all the three former editions of this work, the author has labored to define the power of taxation, and to hedge it round by such constitutional restrictions as might tend to keep it within such limits as not to endanger the absorption of the entire fruits of personal industry and enterprise. But the results of the late civil war, and the enormous increase of public indebtedness of every kind, municipal, state and national, has placed all private and personal rights, by general acclamation, at the discretion of legislative majorities.

This is a result of which we do not complain, and, indeed, it is one for which we long contended, in the early portion of our judicial labors, and which, we have reason to know, was not without its results, in producing a greater degree of legislative independence in some of the states.[3]

if the railway company saw fit to receive the bonds as cash, in payment of the subscription, instead of requiring the city to negotiate and raise money upon them, the transaction was not beyond the corporate powers of either the city or the company. That there was nothing against law or public policy in the agreement of the company to allow the city interest on the stock subscribed for by it; and as long as neither the railway company nor any of its stockholders complained of the provisions of the agreement, the city could not avoid the contract of subscription on the ground that it contained a stipulation which the railway company had no power to make. That though the contract of subscription, as made by the mayor, may have deviated in some particulars from the orders of the common council, yet the latter had adopted and ratified it as made by issuing a portion of the bonds provided for in it. That this was not the delegation by the common council to the mayor of authority which they alone could exercise, but that he was simply the instrument by means of which they acted. That it was the duty of the common council to determine whether the requisite number of the free-holders of the city had petitioned for the subscription, no other tribunal having been appointed for that purpose; and that, having passed upon that question, their determination was conclusive, unless set aside in some direct proceeding for that purpose. Evansville, &c. Railw. *v.* Evansville, *sup.a.* See Sinking Fund Commissioners *v.* Northern Bank of Kentucky, 1 Met. (Ky.) 174, where a lien on the road given to the City of Louisville was held binding on companies to which the road had been sold by the State.

[3] Thorpe *v.* Rut. & Bur. Railw., 27 Vt. 140; State *v.* Conlin, id. 318; Lincoln *v.* Smith, id. 328; State *v.* Parker, 26 id. 357. We hope it will not be

But we think it equally proper and prudent now that the change has come, and the jealousy of the extension of legislative innovation has ceased to exist, or else has been transferred to the courts, who presume to interpose any restrictions, even of a constitutional character, in the way of legislative omnipotence; now that this great change has come, it cannot but be wise to become familiar with the terms in which it is defined.

In Thompson *v.* Lee County,[4] the Supreme Court of the United States declare that the legislature of a state, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railway or other work of internal improvement; to borrow money to pay for it, and to levy a tax to repay the loan; and the state legislatures may also, by retrospective acts, cure any evils existing in consequence of powers so conferred, having been irregularly exercised. And that this power may be exercised either by, or without, submission to a popular vote. And the Court of Appeal in New York[5] have adopted the same rule, in the exact terms declared by the Supreme Court of the United States. We think there need be no further discussion upon this point.

* 2. It was held that the statute of the New York legislature, authorizing railway companies of that state to subscribe for stock * in the Great Western Railway, Canada West, is constitutional.[6]

attributed to conceit or levity, to hint that we cannot but feel some surprise, not to say more, to find those persons who looked upon our early suggestions upon the subject of the existence of the same legislative omnipotence, in the American legislatures, which exists in the British Parliament, unless restrained by the organic law, with so much incredulity, as the result of our own youthful enthusiasm, now so far in advance of us, as to become almost invisible by mere distance. We bid them God speed, in a right course, prudently pursued, but otherwise somewhat perilous. Ib.

[4] 3 Wallace, 327.

[5] People *v.* Mitchell, 35 N. Y. 551.

[6] White *v.* Syra. & Utica Railw., 14 Barb. 559. The City Council of Charleston have the power, under their charter, to subscribe to the stock of railway companies within and without the State, and to tax the inhabitants of the city for the purpose of paying the subscriptions. Copes *v.* Charleston, 10 Rich. (S. C.) 491.

The City Council of Charleston having at different times subscribed to the stock of railway companies within and without the State, the legislature, by an act in 1854, confirmed all such subscriptions, and declared them obligatory on the city council. Held, that the act of 1854 was constitutional; and that no proceeding by *quo warranto* in the name of the State for the purpose of questioning the validity of such subscriptions could afterwards be taken. Ib.

* 3. And the lateral railway acts in Pennsylvania, by which every county in the state is authorized to make railways, and to * condemn land and other private property for the purpose, are held to be constitutional and valid,[7] which is much the same as subscriptions to railway stock by the counties.

4. Some of the New York District Supreme Courts have held, that the constitution of the state, by fair construction, prohibited municipal corporations from making subscriptions to the stock of railways.[8] And it was held, by the Supreme Court of Ohio, * that, where an act of the legislature authorized the trustees of the several townships through which the railway "may be located" to subscribe to the capital stock of the company, and the preliminary

[7] Harvey *v.* Thomas, 10 Watts, 63; Harvey *v.* Lloyd, 3 Penn. St. 331; Schoenberger *v.* Mulhollan, 8 Penn. St. 134.

[8] Clarke *v.* City of Rochester, 5 Am. Law Reg. 289; 13 How. Pr. 204. The opinion of the court, in this case, by *Allen*, J., assumes grounds which tend very strongly to subvert the general right of such corporations to make such subscriptions. But this case was reversed in the general term of the Supreme Court. 24 Barb. 446. It is here said by the court, that internal improvements may be constructed by general taxation, and in case of local works by local taxation; or the State may aid in their construction, by becoming a stockholder in private corporations, or authorize municipal corporations to become such stockholders, for that purpose. Railways are public works, and may be constructed by the State or by corporations.

And in Grant *v.* Courter, 24 Barb. 232, it is decided, that an act of the legislature authorizing the towns, in the counties through which the Albany and Susquehanna Railway is located and in progress of construction, to borrow money, and subscribe for and purchase the stock of the company, with the view of aiding in the completion of the work, is not in contravention of any express or implied constitutional limitation of the power of the legislature, and that the act was within the general power of legislative authority in the State; that the act did not deprive any citizen of his property, or take private property for public use; that this could not be held to be the case, except where property was directly taken and appropriated to public use.

In Benson *v.* The Mayor of Albany, 24 Barb. 248, the same principle is reasserted in regard to an act of the legislature authorizing the city of Albany to loan its credit to the Northern Railway. And this doctrine was afterwards sustained in the Court of Appeals. Starin *v.* Genoa, 23 N. Y. 439. The bonds in this case were held void, the prerequisites to their issue not having been complied with.

And in Wynn *v.* Macon, 21 Ga. 275, the general power of municipal corporations to subscribe for railway stock, by consent of the legislature, is maintained, and also that the legislature may ratify such subscriptions made before the act. And the same principle is maintained in Butler *v.* Dunham, 27 Ill. 474; Commonwealth *v.* Perkins, 43 Penn. St. 400.

vote of the tax-payers and the subscription were made before the road was located, the subscription cannot be enforced, although the road is subsequently located through the township.[9]

5. Where the act of the legislature gave counties the power to subscribe for stock in a railway, *after* and not *before*, the same shall have been "designated, advised, and recommended" by a grand jury, it was held that the recommendation of the grand jury, that the county subscribe for such stock "to an amount not exceeding $150,000," was not such a compliance with the statute as to justify any subscription. They should define the amount more strictly.[10] And bonds of the county, issued on * such a subscription, were enjoined upon a bill in equity, at the suit of the county.[11]

[9] Steubenville & Ind. Railw. *v.* Trustees of Jackson, 4 Am. Law Reg. 702. This case is certainly put upon narrower grounds than would commend themselves to our sense of propriety, if the principle itself were not regarded as one of doubtful character, and therefore to be strictly construed. See also Treadwell *v.* Commissioners of Hancock County, 11 Ohio, N. S. 183.

[10] Mercer County *v.* Pittsburg & Erie Railw., 27 Penn. St. 389; Wetumpka *v.* Winter, 29 Ala. 651. But it was afterwards held that the fact that one grand jury requested the county commissioners to subscribe twenty thousand shares to the capital stock of the Alleghany Railroad Company, and the commissioners subscribed but fifteen thousand, in no way invalidated the subscription made. Commonwealth *v.* Perkins, 43 Penn. St. 400. In a late case in the Supreme Court of the United States, the doctrine was declared, that, though acts of incorporation and other statutes granting special privileges are to be construed strictly, and whatever is not given in express terms withheld, this principle must be applied to the subject-matter as a whole, and in such a manner as not to defeat the intention of the legislature. Moran *v.* Commissioners of Miami County, 2 Black (U. S.), 722. Where a county subscribed for stock in a railway company, and issued bonds to pay therefor, under an act of assembly, providing that such bonds should not be sold below par, and the company sold many of them at 64 per cent, it was held that the county might withdraw the subscription, recover the bonds unsold, and the par value of those which had been sold. Lawrence County *v.* Northwestern Railw., 32 Penn. St. 144. But where the county commissioners themselves sold the bonds below par, the county was held bound to provide for the accruing interest. Commonwealth *v.* Commissioners of Alleghany County, 32 Penn. St. 218. In Woods *v.* Lawrence County, 1 Black (U. S.), 386, a provision that counties might subscribe for stock and pay in county bonds, such bonds not to be sold below par, was held to mean only that the railway company must take them at par.

[11] By act of Feb. 23, 1849, the commissioners of any county through which the Col. P. and Ind. Railway might be located, were authorized, after obtaining a vote of the qualified voters of the county in favor of subscription, to subscribe any sum, not exceeding fifty thousand dollars, to the capital stock of said company, and to borrow money to pay the same, &c.; and if the commissioners of

* 6. A legislative permission to subscribe to the stock of roads leading to the municipality will embrace those passing through it. And it was here held, that such corporations by legislative permission clearly had power to subscribe for railway stocks.[12] In the

any such county should not be authorized by the voters of the county to subscribe for the stock of said road, then the trustees of any township through which the road might be located were authorized to subscribe to such stock, any sums not exceeding fifty thousand dollars, and provide for its payment in the same manner that the county commissioners had been authorized to do. This was amended by an Act dated March 12, 1850, and providing that the commissioners of any county through which the road had been or might be located, that had not already subscribed, or the trustees of any township, or the city or town council of any city or town, in any such county should be authorized to subscribe to the stock of the company any sum not exceeding fifty thousand dollars, under the provisions of the act passed February 23, 1849, and to provide for the payment of the stock in the same manner that the county commissioners had by that act been authorized to do. On the 15th of April, 1851, Union County, through its commissioners, subscribed twelve thousand five hundred dollars to the capital stock of the said road, such subscription having been previously authorized by a vote of the electors of the county. Subsequently, the trustees of Union Township, in the same county, ordered an election to be held in their township on the question of a township subscription to the railway company's stock, and, pursuant to a vote cast at that election, the trustees, on the 9th of July, 1851, on behalf of the township, made a subscription to the stock of the railway company, and in payment therefor executed and issued, in the name of the township, undertakings or certificates of indebtedness to the amount of their subscription.

On proceedings by mandamus at the relation of B., a *bona fide* holder of a portion of such certificates, to compel the trustees of the township to levy a tax sufficient to pay the principal and interest due on such certificates, it was held, that, upon a proper construction of these acts, the trustees of the township were not authorized to subscribe to the stock of the company, after a subscription had been duly authorized and made on behalf of the county; and that the acts of the trustees in that behalf, being without authority of law, imposed no liability upon the township. Beckel *v.* Union Township, 15 Ohio N. S. 437, sustaining Hopple *v.* Brown Township, 13 Ohio N. S. 311, which was decided upon a similar state of facts. But a view more favorable to the validity of such subscriptions was taken in Evansville, &c. Railw. *v.* Evansville, 15 Ind. 395. And see State *v.* Commissioners of Hancock County, 12 Ohio N. S. 596; Commonwealth *v.* Perkins, 43 Penn. St. 400. And in Illinois, it has been lately held, that in an election to decide whether aid shall be given to a railway company, a mere irregularity in conducting it, which does not deprive any voter of his franchise, or allow an illegal vote, will not vitiate the same. Piatt *v.* People, 29 Ill. 54. And see Whittaker *v.* Johnson, 10 Iowa, 161.

[12] City of Aurora *v.* West, 9 Ind. 74. But if the charter do not fix the line to the required point, in order to authorize the subscription, it must be so fixed

further discussion of this case before the courts,[13] it was decided, that negotiable securities issued by a municipal corporation in payment of subscriptions to the capital stock of a railway company are subject to the law merchant, and that mercantile paper, declared void by statute *ab initio*, is void in the hands of *bona fide* holders, and that, as it requires special statutory authority for such corporations to subscribe for railway stock, which must be strictly followed, if the bonds upon their face refer to the authority under which they issue, all persons purchasing the same are affected with notice of any defect in such authority.

7. The judgments of the courts against municipal corporations upon bonds issued to aid in the construction of railways and other public works, are usually enforced by mandamus commanding the corporation to levy a tax and satisfy the same. In consequence of the United States Constitution giving a general jurisdiction to the national courts, in ordinary common-law suits, between party and party, provided they reside in different States, many of these suits are brought in the circuit courts of the United States, and a conflict of authority had arisen between the state and national courts in one state. But the court of last resort in such questions, hold, that after the return of *nulla bona* to an execution issued by a circuit court of the United States against a municipal corporation of a state, bound to levy a tax to pay its debts, *mandamus* lies from such circuit court to compel the levy, even though the state court, after such judgment obtained in the circuit court, and before the application for such mandamus, have enjoined the levy.[14]

by the action of the directors, and until so fixed no valid subscription can be made by such corporation to the stock, and the corporation as well as the directors are affected by notice of the location of the road. s. c. 22 Ind. 88.

[13] Same *v.* Same, 22 Ind. 88. See also Bartholomew Co. *v.* Bright, 18 Ind. 93.

[14] Riggs *v.* Johnson County, 6 Wallace, 166; Weber *v.* Lee County, id. 210; United States *v.* Keokuk, id. 514, 518; Walkley *v.* Muscatine, id. 481.

*CHAPTER XXXII.

CONSTITUTIONAL QUESTIONS.

SECTION I.

When Railway Grants are Paramount and Exclusive.

1. *In the English Constitution there is no restriction upon the legislature.*
2. *Limitation in United States Constitution upon the subject.*
3. *Essential requisites to constitute an exclusive franchise or grant.*
4. *Construction of such grant by the tribunal of last resort.*
5. *Opinion of New Jersey Court of Chancery, and Massachusetts Supreme Court, upon the subject.*
6. *Grants of the use of navigable waters for manufacturing revocable.*
7. *Forfeiture for the benefit of a county may be remitted by legislature.*
8. *Where the legislature repeal the charter of a corporation. Presumptions.*
9. *Statement of an important case in Louisiana.*
10, 11. *Recent decision of U. S. Supreme Court.*
12, 13. *Recent cases in state courts.*

§ 231. 1. VERY little is said in the English statutes, or treatises, in regard to the exclusive powers of railway corporations, it being assumed there that parliament has entire control over such corporations, even to dissolve them. It would follow, of course, that the legislature, having the power to dissolve the corporation at will, might impose any desired restrictions.[1]

2. But in the United States the several state legislatures are expressly prohibited from passing "any law impairing the obligation of contracts," which has been construed to contain a prohibition from taking away, or impairing the exercise of, any of * the essential franchises of a corporation.[2] And the rule obtains

[1] Co. on Litt. 196, n. *o*; 1 Thomas, Arrangement, 157; 1 Black. Com. 484; Dart. College *v.* Woodward, 4 Wheaton, 518. But to the credit of the English nation, this power has never been exercised, except in one or two extreme cases, involving essential political rights, as the suppression of the order of Templars, in the time of Edward the Second, and of the religious houses in the reign of Henry the Eighth. And it is settled law, in Great Britain, that although the sovereign may create, he cannot dissolve, a corporation. The King *v.* Amery, 2 T. R. 515, 568; The King *v.* Passmore, 3 T. R. 190, 205, 206.

[2] Dart. College *v.* Woodward, 4 Wheat. 518; Bridge Proprietors *v.* Hoboken Co., 1 Wallace (U. S.), 116. And the same doctrine is maintained in the late

practically in Great Britain, as will appear by the constitutional history of that country. And in this country the question in regard to what is to be considered an essential franchise of a corporation, is one admitting of almost indefinite range of construction or discretion.[3]

case of the Binghamton Bridge, 3 Wallace (U. S.), 51, 71. And in this case it was held, that the statute of a state may make a contract as well by reference to a previous enactment making one, and extending the rights, &c., granted by such enactment to a new party, as by direct enactment, setting forth the contract in all its particular terms. And a third contract may be made in a subsequent statute by importation from the previously imported contract, in the former statute, and a fourth contract by importation from the third. The Binghamton Bridge, *supra*.

[3] Thorpe *v.* Rut. & Bur. Railw., 27 Vt. 140, where it is said: "It is admitted that the essential franchise of a private corporation is recognized by the best authorities as private property, and cannot be taken without compensation, even for public use. Armington *v.* Barnet, 15 Vt. 746; West River Bridge Co. *v.* Dix, 16 Vt. 476; s. c. in error in the U. S. Sup. Court, 6 How. 507; 1 Bennett's Shelford, 441, and cases cited.

"All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. This is the very point upon which the leading case of Dartmouth College *v.* Woodward was decided, and which every well-considered case in this country maintains. But when it is attempted u on this basis to deny the power of regulating the internal police of the railways, and their mode of transacting their general business, so far as it tends unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country. Many analogous subjects may be adduced to show the right of legislative control over matters chiefly of private concern. It was held, that a statute making the stockholders of existing corporations liable for the debts of the company was a valid law as to debts thereafter contracted, and binding, to that extent, upon all stockholders, subsequent to the passage of the law. Stanley *v.* Stanley, 26 Maine, 191. But where a bank was chartered with power to receive money on deposit, and pay away the same, and to discount bills of exchange, and make loans, and a statute of the State subsequently made it unlawful for any bank in the State to transfer, by indorsement or otherwise, any bill or note, &c., it was held the act was void, as a violation of the contract of the State with the bank in granting its charter. Planters' Bank *v.* Sharp, and Baldwin *v.* Payne, 6 How. (U. S.) 301, 326, 327, 332; Jameson *v.* Planters' & Merchants' Bank, 23 Ala. 168. It is true that any statute destroying the business or profits of a bank, and equally of a railway, is void. Hence a statute prohibiting banks from taking interest, or discounting bills or notes, would be void, as striking at the very foundation of the general objects and beneficial purposes of the charter. But a general statute, reducing the rate of interest, punishing usury, or prohibiting speculations in exchange or in depreciated paper, or the issuing of bills of a given denomination, or creating other banks in the same vicinity, has always been regarded as valid.

* 3. But in this country it is generally required, that to place the powers granted to a corporation above the control of the legislature, they must be either such powers as are essential to the existence and just operation of a corporation, of the kind in question, or else they must be expressly secured to the corporation in its charter.[4] And where the grant to a railway, or other similar corporation, is not exclusive in terms, thus prohibiting the legislature from creating any rival corporation within the prescribed limits, either of time or distance, the legislature may * grant other charters to similar corporations, essentially interfering with the utility and profit of the former franchise or corporation.[5] And even the fact

And while it is conceded the legislature could not prohibit existing railways from carrying freight or passengers, it is believed that, beyond all question, it may so regulate these matters as to impose new obligations and restrictions upon these roads materially affecting their profits, as by not allowing them to run in an unsafe condition, as was held as to turnpikes. State *v.* Bosworth, 13 Vt. 402. But a law allowing certain classes of persons to go toll free is void. Pingry *v.* Washburn, 1 Aiken, 268. So, too, chartering a railway along the same route with a turnpike is no violation of its rights. White River Turnpike Co. *v.* Vermont Central Railw., 21 Vt. 590; Turnpike Co. *v.* Railw. Co., 10 Gill & Johns. 392; or chartering another railway along the same route as a former one, to which no exclusive rights are granted in terms (Matter of Hamilton Avenue, 14 Barbour, Sup. Court, 405); or the establishment of a free way by the side of a toll-bridge. Charles River Bridge *v.* Warren Bridge, 11 Peters, (U. S.) 420." Authority given to a corporation by its charter to "purchase and possess lands, tenements and hereditaments, and personal estate of any kind whatsoever, . . . and to sell and dispose of the same," does not give the corporation power to assign promissory notes. In order to derive a power for a corporation by implication, it must appear that the power thus sought to be derived is so necessary to the enjoyment of specially granted right, that without it that right would fail. The power to assign promissory notes is not essential to the enjoyment of the franchise of banking, or dealing in exchange and stocks and constructing a railway, and hence cannot be implied from the grant of such franchises to a corporation. McIntyre *v.* Ingraham, 35 Miss. 25. And see Madison, &c. Plank-Road Co. *v.* Watertown & Portland Plank-Road Co., 7 Wisc. 59.

[4] Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420. And a law authorizing the courts to sell the franchises and property of a corporation on the application of creditors in payment of its debts, is not beyond the legislative power. Louisville & Oldham Turnpike Co. *v.* Ballard, 2 Met. (Ky.) 165.

[5] State *v.* Noyes, 47 Maine, 189; Lafayette Plank-Road Co. *v.* New Albany & Salem Railw., 13 Ind. 90. In Turnpike Co. *v.* State, 3 Wallace (U. S.), 210, it was held, that if a state grant no exclusive privileges to one company which it has incorporated, it impairs no contract with the first company by incorporating a second company, which the state itself largely manages and profits by to the injury of the first.

that the franchise of the former corporation is essentially destroyed for all beneficial purposes to the grantees, is not sufficient objection to the validity of the subsequent grant, the legislature being themselves the judges when and where the public good requires other similar grants, from whose decision there is practically no appeal. This rule did not obtain without considerable opposition, but it seems now firmly established in the national jurisprudence.[6]

4. And the national tribunal of last resort has of late certainly manifested a marked inclination to construe these exclusive grants to corporations, with very considerable strictness as to the corporations, and with large indulgence in favor of the public, so as to restrain such exclusive privileges, which are always more or less in derogation of public right, within the narrowest limits.[7] Hence in the last case it was held, that a stipulation * in the charter of a railway corporation that the state would not, within thirty

[6] Charles River Bridge *v.* Warren Bridge, 11 Peters (U. S.), 420; s. c. 7 Pick. 507; Lafayette Plank-Road Co. *v.* New Albany & Salem Railw., 13 Ind. 90.

[7] Turnpike Co. *v.* State, 3 Wallace (U. S.), 210; Bridge Co. *v.* Hoboken Land Co., 1 id. 116. The Richmond F. & P. Railw. *v.* The Louisa Railw., 13 How. 71. In this case four of the judges dissented, and Mr. Justice *Curtis* placed his dissent upon the ground, that the charter being recognized as a contract, it was incumbent upon the court to carry into effect its very terms, one of which is, that the legislature will not allow any other railway to be constructed, which may be likely to injure the plaintiffs.

Where power to make and maintain a bridge over a navigable river which forms the boundary between two coterminous states, and take tolls thereon, has been given by the legislatures of both states, neither state can by its subsequent legislation declare that no other bridge shall be built across such river, within certain limits, and thus render the franchise exclusive. President, &c. *v.* Trenton City Bridge Co., 2 Beasley, 46.

By agreement between the States of New Jersey and Pennsylvania, the river Delaware in its whole length and breadth is to be and remain a common highway, equally open for the use of both states, and each state is to enjoy and exercise concurrent jurisdiction upon the waters between the shores of said river. Both states concurred in granting to complainants the right to erect and maintain their bridge, and to take tolls thereon. The legislature of New Jersey afterwards passed an act declaring that it should not be lawful for any person or persons to make another bridge across the Delaware anywhere within three miles of the complainants' bridge. *Held*, that even if this act were intended to take effect without the assent of the state of Pennsylvania, it was void, as being in contravention with the agreement above mentioned between the two states. As, under the agreement, neither state, by its sole jurisdiction, has the right to grant the franchise, so neither can lawfully contract to refuse to grant it. President, &c. *v.* Trenton City Bridge Co., *supra*.

years, allow any other railway to be constructed within certain limits, the probable effect of which would be to diminish the number of a certain description of passengers on the railway then chartered, was not violated by merely chartering another railway which might be used exclusively to transport merchandise, and the state courts decided correctly, in refusing to enjoin the second company from building their road, although if put to the use of transporting passengers it would become an infringement of the exclusive rights of the former company, inasmuch as it did not follow, either from the incorporation of the second company or the erection of their works, that it would be attempted to employ it in the transportation of passengers.[8] The inviolability of such exclusive grants is maintained in almost all the decisions of the state courts upon this subject,[9] except when the franchise of the former corporation is taken for public use, as it may be by making compensation.[10]

It seems to be now settled, that where a railway or canal is chartered with the exclusive grant of the right of transportation between different points, either of goods or passengers, or both, this franchise will be equally infringed by the use of different way-lines, so as to constitute a through line of transportation, as by one continuous parallel route. This was so held in an important case in Massachusets, and it has been recently (1869) so held in an important case in the court of chancery, New Jersey.[11] But this

[8] Richmond, F. & P. Railw. *v.* Louisa Railw., *supra*. And see Bridge Co. *v.* Hoboken Land Co., 2 Beasley, 503; s. c. on appeal, 1 Wallace (U. S.), 116; President, &c. *v.* Trenton City Bridge, 2 Beasley, 46; Akin *v.* Western Railw., 30 Barb. 305.

[9] Piscataqua Bridge *v.* New Hamps. Bridge, 7 N. H. 35; Enfield Bridge *v.* Hartford & N. H. Railw., 17 Conn. 40; Washington Bridge *v.* State, 18 Conn. 53; Mohawk Bridge Co. *v.* Utica & Sch. Railw., 6 Paige, 554; White R. T. Co. *v.* Vermont Cent. Railw., 21 Vt. 590; Washington and Baltimore Turnpike Co. *v.* Balt. & Ohio Railw. Co., 10 Gill & Johns. 392; Harvey *v.* Thomas, 10 Watts, 63; Harvey *v.* Lloyd, 3 Penn. St. 331; Shoenberger *v.* Mulhollan, 8 Penn. St. 134; Thompson *v.* New York & H. Railw., 3 Sandf. Ch. 625.

[10] West River Bridge *v.* Dix, 6 Howard, S. C. 507, 529; Pierce *v.* Somersworth, 10 N. H. 370; 11 id. 20; Bonaparte *v.* C. & A. Railway, 1 Bald, C. C. 205; Tuckahoe Canal Co. *v.* T. & James River Railw., 11 Leigh, 42; Armington *v.* Barnet, 15 Vt. 745; West River Bridge *v.* Dix, 16 Vt. 446; State *v.* Noyes, 47 Maine, 187.

[11] Delaware & Raritan Canal *v.* Camden & Atlantic Railw. & Raritan & Del. Bay Railw., 1 C. E. Green, 321.

will not preclude the separate companies from carrying way freight or passengers. It is only the through transportation which is to be regarded as the exclusive franchise of the through line.[11] *But this subject received a very elaborate discussion in an important case, by a judge of large experience, learning, and ability, and was determined by a court, whose judgments are entitled to the highest consideration by all the co-ordinate or superior tribunals in the country. We have therefore deemed it to be the most profitable matter which we could offer to the profession upon this important subject.[12]

[12] Boston & Lowell Railw. Corporation *v.* Salem & Lowell, Boston & Maine, and Lowell & Lawrence Corporations, 2 Gray, 1.

"*Bill for an injunction against defendants for unlawfully disturbing plaintiffs in the enjoyment of their franchise.* The case shows, that in 1830, plaintiffs' corporation was chartered to construct a railroad from Boston to Lowell, with capital stock of $500,000, and it was provided that the legislature might regulate the tolls to a certain extent, and purchase the railroad itself after ten years. By § 12, it was provided, 'That no other railroad than the one hereby granted shall, within thirty years from and after the passing of this act, be authorized to be made leading from Boston, or Charlestown, or Cambridge, to Lowell, or from Boston, Charlestown, or Cambridge, to any place within five miles of the northern termination of the railroad hereby authorized to be made.' The plaintiffs proceeded and built the road, and have ever since maintained it.

"Since plaintiffs' road was constructed the three corporations, defendants, have been created, and, by permission of the legislature, have formed junctions at the towns of Tewksbury and Wilmington, so that a line of railroad communication has been established between Lowell and Boston, through Charlestown, only one and three-fifths miles longer than plaintiffs', and at no point more than three miles and one-third distant therefrom, having one terminus at Lowell within half a mile of the northern terminus of plaintiffs' road, and a station-house at Charlestown for passengers, and a southern terminus in Boston one half mile nearer the centre of business in Boston than the southern terminus of plaintiffs' road."

Shaw, Ch. J., after determining that the court have jurisdiction, said: —

"The next question material to be considered is, what are the rights of the plaintiffs under their act of incorporation?

"This was one of the earliest acts providing for the establishment of railroads in this commonwealth for the transportation of passengers and merchandise, so early, indeed, and with so little foresight of the actual accommodations as they were afterwards provided and found necessary, that it was rather regarded as an iron turnpike, upon which individuals and transportation companies were to enter and run with their own cars and carriages, paying a toll to the corporation for the use of the road only, and the act authorized the corporation to make suitable rules and regulations as to the form of cars, the time of running, &c., which might be found necessary to render such use of the railroad safe and

* 6. It seems to be now regarded as settled by the supreme national tribunal, that grants made by a state to use the waters of

beneficial. Of course neither the government nor the undertakers had any experience, and could not form an accurate or even approximate estimate of the cost of the work, or the profits to be derived from it. And it appears by the act itself and its various additions, that the capital was increased from time to time, from $500,000 to $1,800,000. With this want of experience, and with an earnest desire on the part of the public to make an experiment of this new and extraordinary public improvement, it would be natural for the government to offer such terms as would be likely to encourage capitalists to invest their money in public improvements, and after the experience of capitalists in respect of the turnpikes and canals of the commonwealth which had been authorized by the public, but built by the application of private capital, but which, as investments, had proved in most cases to be ruinous, it was probably no easy matter to awaken anew the confidence of moneyed men in these enterprises.

"In construing this act of incorporation, we are to bear in mind the time and circumstances under which it was made, but more especially to take into consideration every part and clause of the act, and deduce from it the true meaning and intent of the parties. The act, like every act and charter of the same kind, is a contract between the government on the one part, and the undertakers accepting the act of incorporation on the other, and therefore what they both intended by the terms used, if we can ascertain it, forms the true construction of such contract.

"It conferred on the persons incorporated the franchise of being and acting as a corporation, and the authority to locate, construct, and finally complete a railroad at or near the city of Boston, thence to Lowell. That this was regarded as a public improvement, and intended for the benefit of the public, is manifest from the whole tenor of the act, more especially from the authority to take property on paying a compensation in the usual manner, which would otherwise be wholly unjustifiable. It is equally manifest, from the whole tenor of the act, and the nature of the subject, that the work would require a large outlay of capital.

"How, then, are the undertakers to be compensated for the work thus provided for the public at their expense? This is answered by § 5, which provides that a toll is granted for the sole benefit of such corporation, upon all passengers and property of all descriptions, which may be conveyed or transported on such road, at such rates as the company in the first instance shall fix. This is in every respect a public grant of a franchise which no one could enjoy but by the authority of the government. This grant of toll is subject to certain regulations within the power of the government, if it should become excessive.

"We are then brought to § 12, upon which the stress of the argument in the present case has seemed mainly to turn. It provides that no other railroad than the one hereby granted, shall, within thirty years, be authorized to be made leading from Boston, Charlestown, or Cambridge, to Lowell, or from Boston, Charlestown, or Cambridge, to any place within five miles of the northern terminus of the railroad hereby authorized, that is, the termination at Lowell. The question is, does this provision confer any exclusive right, interest, franchise, or benefit

* navigable streams for purposes of manufactures, &c., are in their nature revocable, and that the granting of similar powers * to

on this corporation? It is found in the same act, the whole is presented at once to the consideration of the corporators, to be accepted or rejected as a whole, and this would of course constitute a consideration in their minds in determining whether to accept or reject the charter. If it adds any thing to the value and benefit of the franchise, such enhanced value is part of the price which the public propose to pay, and which the undertakers expect to receive, as their compensation for furnishing such public improvement.

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

"It was made by government, in its sovereign capacity, with subjects who were encouraged by it to advance their property for the benefit of the public. It was certainly a stipulation on the part of the government regulating its own conduct and putting a restraint upon its own power to authorize any other railroad to be built with a right to levy a toll, but without an authority from the government no other company or person could be authorized so to make a railroad and levy toll, and of course no other road could be lawfully made.

"It was therefore equivalent to a covenant for quiet enjoyment against its own acts and those of persons claiming under it. This is in fact all that the government could stipulate. It could not covenant for quiet enjoyment against strangers and intruders, against the unauthorized and illegal disturbance of their rights by third persons; against those they would have their remedy in the general laws of the land.

"But it has been argued that this stipulation as it appears in the charter is a mere executory covenant or undertaking, and is not an executed contract.

"But we think it may be both; so far as it confers a present right it is executed, so far as it amounts to a stipulation that the covenantor will not disturb the enjoyment of the right granted, it may be deemed executory. So a deed conveying land transfers on its delivery all the title and interest the grantor can confer, and is also a stipulation that the benefit granted shall not be revoked or impaired. And this is held to apply to grants of government as well as to those of individuals. Fletcher *v.* Peck, 6 Cranch, 87.

"He who has the power of conferring a right or a franchise lying solely in grant, and who stipulates for a valuable consideration that another shall have and enjoy it undisturbed and unmolested by any act or permission of his, in effect grants such right or franchise. But more especially when such right is conferred by the community in the form of a statute having all the forms of law, and sanctioned by the government acting in behalf of all the people and having power to bind them by law, such right would seem to be clothed with as much solemnity, and to have the same effect and force as if it were the grant of an exclusive right in terms. We are therefore of opinion that under this form of words no other railroad should be authorized to be made for thirty years, the government, as far as it was in their power, intended to engage with the corporation that no other direct railroad between Boston and Lowell should be legally

other corporations for public purposes, is no infringement of the former grant.[13]

made, leaving them to guard themselves from unauthorized and illegal disturbance by the general laws in the course of the ordinary administration of justice. This is strengthened by the consideration, that, as their whole remuneration would depend upon tolls, uncertain in amount, it was intended that they should be to some extent secure against any authorized road taking the same travel and of course the same tolls. There is a provision in the close of this section twelve which in our judgment adds some weight to this conclusion. This is a right reserved to the commonwealth after a certain term of years, to purchase the railroad and all the rights of the corporation on reimbursing them the whole cost, with ten per cent profit, and then follows this provision: 'And after such purchase the limitation provided in this section (that no railroad shall be authorized to be made) shall cease and be of no effect.' From this provision it is manifest that the restriction, as it is termed, was imposed on the government, and of course upon all the subjects for the benefit of this corporation; and after the government should have succeeded to their rights by purchase, then there would be no longer any occasion to impose any restriction on the government: it might do what it would with its own, and it would be at liberty to make any other grant or not at pleasure. This carries a strong implication that until such purchase, and so long as the income from tolls would enure to the benefit of the proprietors, the exclusive right, so far as these restrictions upon other railroads to take the same travel and the same tolls make it exclusive, should stand part of the charter.

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

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

"But in addition to the law-making power the legislature is the representative of the whole people, with authority to control and regulate public property and public rights, to grant lands and franchises, to stipulate for purchase and obtain all such property, privileges, easements, and improvements as may be necessary or useful to the public, to bind the community by their contracts therefor, and generally to regulate all public rights and interests. It is under this authority that lands are granted, either in fee or upon any other tenure, that the uses of navigable streams and waters are regulated, the right to build over navigable waters, to erect bridges, turnpikes, and railroads, and other similar rights and privileges are granted and justified; of the necessity and convenience of all roads

[13] Rundle *v.* Delaware & Raritan Canal Co., 14 Howard, 80; Shrunk *v.* Schuylkill Nav. Co., 14 S. & R. 71; Susquehanna Canal Co. *v.* Wright, 9 W. & S. 9; Monongahela Nav. Co. *v.* Coons, 6 Watts & S. 101.

* And the grantee of such subsequent grant having acquired an absolute right not in any sense limited by the prior grant, it is * not

and other public works and improvements, of their fitness and the best modes of providing them, the established government of the state, acting by the legislature for the time being, must necessarily judge and determine.

"They must decide whether it is best to provide for them by funds from the public treasury, or to procure individuals to advance their own funds for the purpose, to be reimbursed by tolls, and to make just and adequate provisions incident to each. Supposing ferries or bridges are obviously necessary over a long and broad river, it is equally obvious that no public convenience would require them to be built parallel and close to each other; on the contrary, such erections would be an unnecessary waste of property. Would it not be for the legislature to decide within what stated and fixed distance from each other convenience would require them? If they were erected by funds drawn directly from the State, the legislature would plainly have the power to determine such distances, and provide that no one should be built within the distances thus fixed. May they not, with a due regard to the public exigencies and public interests, do the same thing when such public works are erected by individuals at the instance and procurement of the government, for public use? Were it otherwise, and were all such grants and stipulations repealable by a subsequent legislature, because they are in the form of laws, then the unlimited power of the legislature to alter and change the laws, sometimes called, rather extravagantly, the omnipotence of parliament, would be a source of weakness and not of strength.

"In making such grants and stipulations, no doubt great caution and foresight are requisite on the part of the legislature, a just estimate of the public benefit to be procured, and the cost at which it is to be obtained; and, as great changes in the state of things may take place in the progress of time, a great increase of travel, for instance, on a given line, which changes cannot be specifically foreseen, it is the part of wisdom to provide for this, either by limitation of time, reservation of a power to reduce tolls, should they so increase at the rates first fixed as to become excessive, or of a right to repurchase the franchise upon equitable terms, so that the contract shall not only be just and equal, in the outset, but, within reasonable limits, continue to be so. In the charter of the Boston and Lowell Railroad Corporation, the government reserved the right both to regulate the tolls and purchase the franchise, upon terms fixed, and making part of the contract. When such a contract has been made on considerations of an equivalent public benefit, and when the grantees have advanced their money to the public upon the faith of it, the State is bound by the plain principles of justice faithfully to respect all grants and rights thus created and vested by the contract. Such a power of regulating public rights is everywhere recognized as one distinguishable from that of legislation, a power incident and necessary to all well-regulated governments, and, when rightly exercised, is within the constitutional power of the legislature, and binding upon the government and people. The court are of opinion that these principles are well established by authorities. Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35; Livingston *v.* Van Ingen, 9 Johns. 507.

"In the case of Charles River Bridge *v.* Warren Bridge, both in this court

proper to submit the question to the jury whether, without unreasonable expense or undue injury to the second grantee, it * might

and in the Supreme Court of the United States, it was not doubted that a State would be bound by a grant of an exclusive right to a bridge or ferry, made in terms by the legislature; on the contrary, the validity of such grant was implied. The controversy turned on the question, whether, by the simple grant of a toll-bridge or ferry, from one terminus to another, any exclusive grant could be implied to take toll for that line of travel, so as to bar the legislature from granting a right to build a bridge to and from other termini on the same line of travel. 7 Pick. 344; 11 Peters, 420.

"In Fletcher *v.* Peck, 6 Cranch, 135, the court say, 'Where a law is in its nature a contract, where absolute rights have been vested under that contract, a repeal of that law cannot divest those rights.' So any law granting privileges to others repugnant to these previously granted, which if available would be a repeal by implication, is obnoxious to the same objection. That which cannot be repealed in express terms, cannot be repealed by implication, by the enactment of laws repugnant to the provisions of the former act. The same defect of power which invalidates the one has the same effect upon the other.

"IV. But it is earnestly insisted that the grants to the defendants' corporations do warrant and justify them in setting up the line of transportation by railroad by the union of the several sections of their respective railroads, and that it may be regarded as lawfully done under the right of the government to appropriate private property for public use.

"It is fully conceded that the right of eminent domain, the right of the sovereign, exercised in due form of law, to take private property for public use, when necessity requires it, of which the government must judge, is a right incident to every government, and is often essential to its safety.

"And property is *nomen generalissimum* and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments.

"Even the term 'taking' which has sometimes been relied upon as implying something tangible or corporate, is not used in the Massachusetts bill of rights, but the provision is this: 'Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' Art. 10. Here again the term 'appropriate' is of the largest import, and embraces every mode by which property may be applied to the use of the public. Whatever exists, which public necessity demands, may be thus appropriated.

"It was held in the Supreme Court of the United States, that a franchise to build and maintain a toll-bridge might be so appropriated, and that the right of an incorporated company to maintain such a bridge under a charter from a State, might, under a right of eminent domain, be taken for a highway. West River Bridge *v.* Dix, 6 How. 507.

"The same point was afterwards decided in the same court in the case of a railroad. Richmond, &c. Railroad *v.* Louisa Railroad, 13 Howard, 83. Such appropriation is not regarded as impairing the right of property or the obligation of any contract, on the contrary it freely admits such right, and in all just gov-

not have so exercised the franchise as to have avoided the injury to the first grantee.[14] But such a view would seem at first * blush

ernments provision is made for an adequate compensation which recognizes the owner's right.

"Nor does it appear to us to make any difference whether the land or any other right or interest thus appropriated, be derived directly from the government or be acquired otherwise, for the reason already stated, that it does not revoke the grant or impair or annul the contract, but recognizes and admits the validity of both. If for instance a government, through its authorized agent had contracted to convey land to an individual, and afterwards, and before the title passed, it should be necessary to appropriate such land to public uses, such taking would not impair the obligation of the contract, the individual would have the same right to compensation for the loss of his equitable title to the land as he would have had for the land itself, if the title to it had passed. If, therefore, in the great advancement of public improvements, in the great changes which take place in the number of inhabitants, in the number of passengers and quantity of property to be transported, or in great and manifest improvements in the mode of travel and locomotion, it becomes necessary to appropriate in whole or in part a franchise previously granted, the existence of which is recognized and admitted, we cannot doubt that it would be competent for the legislature in clear and express terms to authorize the appropriation of such franchise, making adequate compensation for the same.

"But we cannot perceive in the acts of incorporation of the three defendant corporations, or in any of the acts in addition thereto, any act of the government taking or appropriating any of the rights, franchises, or privileges of the plaintiffs' corporation, under the right of eminent domain. The characteristics of such an appropriation are known and well understood. It must appear that the government intend to exercise this high sovereign right by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent.

"It must also appear by the act that they recognize the right of private property and mean to respect it, and under our constitution the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property for any use other than a public one, or fails to make compensation, the act is simply void, no right of taking as against the owner is conferred, and he has the same rights and remedies against a party acting under such authority as if it had not existed.

"In general, therefore, where any act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those affected."

It was therefore *held*, that the exclusive right for thirty years granted the

[14] New York & Erie Railw. *v.* Young, 33 Penn. St. 175.

to impinge against the free scope of the maxim *sic utere tuo ut alienum non lædas*. And where a railway company obtain a grant for building their road across a navigable stream, provided the navigation be not thereby obstructed, this includes an obstruction caused by the framework and scaffolding used in the course of construction.[15]

7. But a provision in the charter of a railway that if the company do not locate their road according to the provisions of the act, they shall forfeit one million of dollars to the state, for the benefit of a particular county, though assented to by the company, does not constitute a case of contract, but one of penalty, subject, as to its enforcement, to the will and pleasure of the legislature.[16]

* 8. Where the legislature reserve the right to repeal the charter of a corporation, if the franchises should be abused or misused, and the legislature exercise the power to repeal, it will be presumed to have been exercised properly, and the act held constitutional, unless the company clearly show that their franchises had not been abused or misused.[17] If the company accept a regrant of

plaintiffs by their charter is subject, like other property, to be appropriated for public use, on compensation therefor, whenever the public exigencies require it, in the opinion of the legislature.

In conclusion the court intimate, that, by express grant the legislature, by the exercise of the right of eminent domain, might perhaps have legally authorized defendants to construct and maintain a railway from Lowell to Boston, but inasmuch as no express grant to that effect has been made, it was held that they had no right to establish, by means of junctions with each other, a continuous line of transportation by railway from Lowell to Boston, and that such a connection is making a railway within the meaning of plaintiffs' charter, and is such an infringement as to be a nuisance to plaintiffs' rights, for which they are entitled to a remedy. And an injunction was granted. But see Michigan Central Railw. *v.* Michigan Southern Railw., 4 Mich. 361.

[15] Memphis & Ohio Railw. *v.* Hicks, 5 Sneed, 427.

[16] State *v.* Baltimore & Ohio Railw., 12 Gill & Johnson, 399. It is said in this case, that a contract made by the State, for the benefit of one of its counties, is not within the purview of that provision of the United States constitution, which prohibits the States from passing any law impairing the obligation of contracts, so as to hinder the State from releasing the contract, or discontinuing an action brought for its enforcement, in the name of the State.

In this case, in error in the United States Supreme Court, 3 Howard, 534, it is held, that this was a penalty, imposed upon the company, as a punishment for disobeying the law, and the legislature had the right to remit it.

[17] Erie & Northeast Railw. *v.* Casey, 26 Penn. St. 287; *post*, § 254. And where the legislature has reserved the power to modify any charters that it may

the railway, with enlarged powers, it is thereby estopped to deny the validity of the repealing act.[17] The pendency of judicial proceedings against the company does not suspend the exercise of the repealing power by the legislature.[17] Nor can it alter the nature of the contract growing out of the charter.[17]

* 9. In a recent case in Louisiana,[18] where the plaintiffs' company

grant, an act, in its terms applicable to all railways, will affect any railway company whose charter does not contain an express limitation to the contrary. Bangor, Oldtown, & Milford Railw. v. Smith, 47 Maine, 35. In State v. Noyes, 47 Maine, 189, it was held that the legislature had not the right to determine whether a corporation has abused or exceeded its powers. Under a power reserved to amend the charter of a corporation, the legislature may impose upon the corporation any additional condition or burden connected with the grant, which they may deem necessary for the public good, or which they might justly have imposed originally. English v. New Haven & Northampton Co., 32 Conn. 240. And See Delaware Railw. v. Thorp. 1 Houston (Del.), 149; State v. Dawson, 16 Ind. 40; Atkinson v. Marietta & Cincinnati Railw., 15 Ohio N. S. 21; Lafayette Plank-Road Co. v. New Albany, &c. Railw., 13 Ind. 90; Matter of Kerr, 42 Barb. 119; People v. Kerr, 27 N. Y. 188; Philadelphia & Reading Railw. v. Philadelphia, 47 Penn. St. 325; Milhau v. Sharp, 27 N. Y. 611; Brooklyn City & Newtown Railw. v. Coney Island & Brooklyn Railw., 35 Barb. 364; Cincinnati & Spring Grove Avenue Street Railw. v. Cumminsville, 14 Ohio N. S. 523; Chenango Bridge Co. v. Binghamton Bridge Co., 27 N. Y. 87; s. c. 3 Wallace (U. S.), 51; Pres't, &c. v. Trenton City Bridge Co., 2 Beasley, 46; Bridge Co. v. Hoboken Land Improvement Co., 2 Beasley, 81; s. c. 2 Beasley, 503; s. c. 1 Wallace (U. S.), 116; Sixth Avenue Railw. v. Kerr, 45 Barb. 138. In Branson v. Philadelphia, 47 Penn. St. 359, it was held, that every person holding license from a public authority exercising the whole or a portion of the right of eminent domain, necessarily takes it subject to the exercise of this right whenever required by the public good. See also Akin v. Western Railw., 30 Barb. 305.

[18] Pontchartrain Railw. v. New Orleans & Car. & Lake P. Railway, 11 Louis. Ann. 253. The court, in their opinion, profess to base themselves upon the case of the Boston & Lowell Railw. v. Salem & Lowell Railw., 2 Gray, 1.

The rule of decision in regard to the constitutionality of the enactments of the State legislatures, and indeed of the national legislature, is so familiar to the profession, as scarcely to justify its repetition. Such acts are not ordinarily declared unconstitutional, unless for some obvious conflict with the very terms of the constitution itself, or some manifest violation of the acknowledged principles of legislative authority. It will never be done, upon the basis of some undefined theory of the wisdom or justice of the enactment, or of the class of enactments, to which it belongs. See, upon this subject, Calder v. Bull, 3 Dallas, 386; Satterlee v. Matthewson, 2 Pet. (U. S.) 380; Sharpless v. Mayor of Philadelphia, 21 Penn. St. 147.

In the Supreme Court of Wisconsin, in Lunsden v. City of Milwaukee, 8 Wisc. 485; s. c. 6 Am. Law Reg. 157, it was decided, that as by the 11th article of the

were incorporated in 1830, with the exclusive * privilege of constructing and using a railway leading to and from the city of New

constitution of Wisconsin, it is provided that "no municipal corporation shall take private property for public uses, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury;" that where the charter of the city of Milwaukee authorized the judge of the circuit or county court of Milwaukee, where land is proposed to be taken for public use, to appoint twelve jurors to view the ground, determine the necessity of the taking, and assess the damages therefor, but did not in express terms require that the jury should be sworn before entering upon their duties, or provide any mode for swearing them; that the act was unconstitutional, and the proceedings under it void, though the jury may have been in fact sworn.

It seems to us, that if this case is correctly reported, it presents a remarkable departure from the usual rule of construction, in regard to constitutional provisions. There seems here to have been a studious effort, by construction, to raise a conflict between the statute and the constitution; while the ordinary rule of construction, in such cases, undoubtedly is, to avoid such conflict, when it can fairly be done.

It would seem, that not only the duty of swearing the jury should have been implied, from the due course of such proceedings, but that even if the act had provided, in terms, that the jury should not be sworn, it was still so much mere matter of form, that it ought not to have been held a fatal conflict between the law and the constitution, there being no express provision in the constitution that the jury should be sworn.

In a case in Tennessee, Ferguson *v.* The Miners' & Manufacturers' Bank, 3 Sneed, 609, it was attempted to escape from the force of an act of the legislature, upon the ground that its passage was obtained by imposition and fraud, without the majority of the legislature being made aware of the extent of the bill, and that this was done, by design, through the instrumentality of certain members of the legislature. The court declined to recognize the validity of such grounds of impeachment of the acts of the legislature. And the same view of the law seems to be maintained, by *Marshall*, Ch. J., in Fletcher *v.* Peck, 6 Cranch, 87. See also, as to the interpretation of provisions in the charter of a corporation affecting public rights, State *v.* Passaic Turnpike Co., 3 Dutcher, 217, where, under a provision that "no gate or turnpike shall be erected in any part of a highway which has heretofore been used as such," it was held, that when the ancient highway had been vacated and the right of the public over a certain part terminated, the prohibition against the erection of a gate at that place also ceased.

And when a bridge company, claiming an exclusive right within certain limits, asks an injunction to prohibit the building of another bridge within such limits, a court of equity will not lend its aid when it appears from the answer that the bridge of the complainants has been so far appropriated to the purposes of a railway as to render it inconvenient and dangerous to ordinary travel. President, &c. *v.* Trenton City Bridge Co., 2 Beasley, 46.

In Akin *v.* Western Railw., 30 Barb. 305, it was held, that the carrying of passengers across the river between Albany and Greenbush, free of charge by the Western Railroad Company on its ferry-boats, was not a violation of the rights

Orleans, and to and from Lake Pontchartrain; and in *1833 the New Orleans & Carrollton Railway was incorporated for the construction of a railway from New Orleans to *Carrollton; and in 1840 the Jefferson and Lake Pontchartrain Railway was incorporated for the construction of a railway from *Carrollton to Lake Pontchartrain; and the two last named companies entered into an arrangement, by which "through" trains were *run from New Orleans to the lake, the plaintiffs asked for an injunction against the defendants; it was held, that the grant of *another railway from New Orleans to Lake Pontchartrain would have been an infringement of the privileges granted to the plaintiffs by their act of incorporation, and that the legislature could no more grant the power to two or more companies than it could to one.

It is further said, that, if the object of the two companies was in good faith to accommodate different lines of travel and trade, and not to engross that which would naturally pass over the plaintiffs' road, it would be lawful, although incidentally it might sometimes divert travel or traffic from plaintiffs' road. But if the union of the two roads was made for the purpose of transporting freight and passengers to and from the prohibited points, it could not be vindicated.

It is further said, that, although defendants' acts of incorporation were not unconstitutional in themselves, the moment the roads are connected, so as to form a continuous line of railway between the two prohibited points, they become so, as far as it concerns the direct travel between the two points, as much as a single act of incorporation, direct from one point to the other, would have been. This seems an exceedingly sensible view of the subject, and one which cannot fail to commend itself to practical men.

10. The more recent decisions of the national tribunal of ultimate resort upon questions of exclusive grants, render it more difficult than formerly to anticipate precisely what may be hereafter regarded as the only safe basis upon which to predicate such a claim. In the very latest reported decision of that court,[19] the opinion by Mr. Justice *Nelson* seems to recognize

conferred upon Akin and Schuyler by their grant from the corporation of Albany, made on the 1st of October, 1852, of the exclusive right of ferriage for the term of twelve years.

[19] Turnpike Co. *v.* The State of Maryland, 3 Wallace (U. S.), 210.

the old foundations, that any such claim must rest either upon an exclusive grant in terms, or by clear implication, and that all reasonable intendments will be made against any such exclusive grant. And the same view is maintained in the dissenting opinion of Mr. Justice *Grier* in the Binghamton Bridge case,[20] which is concurred in by two of the other judges. And this is the ground upon which the last case referred to is placed by the court of Appeals in New York.[21]

*11. But the decision of the majority of the court in the Binghamton Bridge case seems to us to be putting all the former decisions of the court upon this point at utter defiance, and to erect a platform for exclusive privileges and grants, which, without much enlargement, might be made to carry safely almost any claim of the kind. For it seems impossible to argue that there was any express exclusive grant in that case, or that one could be fairly implied except by the most liberal construction. But we have no great apprehension that the decision will hereafter be regarded as a safe precedent.

12. The cases which have occurred in the state courts since the former edition, bearing upon this point, are considerably numerous, but not of the greatest interest.

(1.) The question has been somewhat discussed in New Jersey in regard to bridges across the river Delaware. But these questions[22] are so much affected by compacts between the adjoining states as not to be of any special interest to the profession generally. It was decided, in the last case cited, that where one bridge company sets up a claim of exclusive right, within certain limits, and seeks for an injunction prohibiting the building of another bridge within those limits, a court of equity will not lend its assistance when it appears from the answer of the defendants that the plaintiffs' bridge has been so far appropriated to the uses of a railway as to render it inconvenient and dangerous for ordinary travel.[22]

(2.) The erection of a railway bridge for the passage of persons only, in the cars of the company, is no infringement of the exclusive privileges of an existing bridge for ordinary travel.[23] It is

[20] 3 Wallace (U. S.), 51.

[21] 27 N. Y. 87.

[22] The Trenton City Bridge Co., 2 Beasley, 46.

[23] Bridge Co. *v.* Hoboken Land & Imp. Co., 2 Beasley, 81; s. c. 2 Beasley, 503; 1 Wallace (U. S.), 116; *supra*, n. 18.

declared in these cases that no structure across a river could be regarded as a bridge, within the fair construction of the plaintiffs' charter, unless it had a foot-way for man and beast to pass on. The cases are reviewed, and this is here shown to be the common-law definition of a bridge across rivers.

13. The conflicting rights of different grantees along the shores of tide-waters, are discussed in a recent case in New York.[24]

* SECTION II.

Power of the Legislature to impose Restrictions upon existing Corporations.

1. *Are subject to legislative control in regard to police.*
2 and n. 3. *Opinion of court in a case as to railways.*
3. *Important early case in Maryland.*
4. *Extent of a reserved power to repeal charters of corporations.*
5. *Where the charter is expressly exempted from legislative control.*
6. *Effect of public patronage in regard to legislative control.*
7. *Railway companies may be compelled to modify their erections.*
8. *Summary remedies given to a corporation no part of its franchises.*
9. *Statutes to compensate for animals killed on the railway tracks apply to existing as well as future companies.*

§ 232. 1. The power of the legislature to impose new burdens, restrictions, or limitations, upon existing corporations, is one of some difficulty. There are confessedly certain essential franchises of such corporations which are not subject to legislative control; and at the same time it cannot be doubted that these artificial beings or persons, the creations of the law, are equally subject to legislative control, and in the same particulars precisely, as natural persons.[1] Railways, so far as the regulation of their own police affecting the public safety, both as to life and

[24] Taylor *v.* Brookman, 45 Barb. 106.

[1] Although a charter granted to a corporation by the state is a contract between the state and corporation, the obligation of which cannot be impaired by subsequent legislation, corporations, like natural persons, are subject to remedial legislation and amenable to general laws. Coffin *v.* Rich, 45 Me. 507. When a private corporation, doing business in the city, creates in the course of its business a nuisance which causes injury to the property of a citizen, such corporation will be responsible therefor in an action, notwithstanding such city may have attempted to authorize the acts which caused the nuisance. Gas Co. *v.* Teel, 20 Ind. 131.

property, and also the general police power of the state, as to their unreasonable disturbance of, and interference with, other rights, either by noise of their engines in places of public concourse, as the streets of a city, or damage to property, either in public streets and highways or escaping from the adjoining fields; there can be no question whatever, are subject to the right of legislative control.[2]

* 2. And this right extends not only to the matters enumerated, but to an infinite variety of other matters coming into the same general description of the public police, and the police of the railway; of the importance or necessity of which the legislature must be the judge.[3]

[2] In State *v.* Noyes, 47 Me. 189, it was held that private corporations, without any express reservation of the powers over them by the legislature in their charter, are subject, like individuals, to be restrained, limited, and controlled in the exercise of their powers, by such laws as the legislature may pass, based upon the principles of safety to the public. But police regulations established by the legislature for the mere convenience of the public or of travellers on a railway, cannot be upheld against individuals or private corporations. Police regulations imposed upon a corporation in violation of the rights secured to such corporation by its charter are not binding upon it. Ib. See State *v.* Jersey City, 5 Dutcher, 170.

[3] Boston, Concord, & Montreal Railw. *v.* State, 32 N. H. 215, where it is held that the legislature may subject existing railway companies to indictment for negligence causing the death of any person. In Thorpe *v.* Rutland & Burlington Railw., 27 Vt. 140, the subject is very extensively examined. "The present case involves the question of the right of the legislature to require existing railways to respond in damages for all cattle killed or injured by their trains until they erect suitable cattle-guards at farm-crossings. No question could be made where such a requisition was contained in the charter of the corporation, or in the general laws of the state at the date of the charter. But where neither is the case, it is claimed that it is incompetent for the legislature to impose such an obligation by statute, subsequent to the date of the charter.

"It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the constitution of the United States or of the particular state in question. I am not aware that the constitution of this state contains any restriction upon the legislature in regard to corporations, unless it be that where

* 3. There is an early case in Maryland,[4] where the legislature, by special statute, enabled the defendants to issue bonds for the * pay-

'any person's property is taken for the use of the public, the owner ought to receive an equivalent in money'; or that there is any such restriction in the United States constitution except that prohibiting the states from passing any law impairing the obligation of contracts.

"It is a conceded point upon all hands that the Parliament of Great Britain is competent to make any law binding upon corporations, however much it may increase their burdens or restrict their powers, whether general or organic, even to the repeal of their charters.

"This extent of power is recognized in the case of Dartmouth College *v.* Woodward, 4 Wheat. 518, and the leading authorities are there referred to. Any requisite amount of authority, giving this unlimited power over corporations to the British Parliament, may readily be found. And if, as we have shown, the several state legislatures have the same extent of legislative power, with the limitations named, the inviolability of these artificial bodies rests upon the same basis in the American states with that of natural persons. And there are no doubt many of the rights, powers, and functions of natural persons which do not come within legislative control. Such, for instance, as are purely and exclusively of private concern, and in which the body politic, as such, have no special interest.

"II. It being assumed, then, that the legislature may control the action, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons, that is, in all matters coming within the general range of legislative authority, subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken without compensation, it becomes of primary importance to determine the extent to which the charter of a corporation may fairly be regarded as a contract within the meaning of the United States constitution.

"Upon this subject the decisions of the United States Supreme Court must be regarded as of paramount authority. And the case of Dartmouth College *v.* Woodward, being so much upon the very point now under consideration, and the leading case and authoritative exposition of the court of last resort upon that subject, must be considered as the common starting point, the point of divergence, so to speak, of all the contrariety of opinion in regard to it.

"Mr. Chief Justice *Marshall* there says, 'A corporation is an artificial being, — the mere creature of the law, — it possesses only those properties which the charter of its creation confers upon it, either *expressly* or as *incidental to its very existence*.' The decision throughout treats this as the fundamental idea, the pivot upon which the case turns. The charter of a corporation is thus regarded as a contract, inasmuch as it is an implied undertaking on the part of the state, that the corporation, as such, and for the purposes therein named or implied, shall enjoy the powers and franchises by its charter conferred. And any statute essentially modifying these corporate franchises is there regarded as a violation of the charter. But when we come to inquire what is meant by the franchises of

[4] McCullogh *v.* A. & E. Railw., 4 Gill, 58.

* 430, 431

ment of their debts, providing that the interest should be paid out of a certain fund designated in the act for that purpose, * the prin-

a corporation, the principal difficulty arises. Certain things, it is agreed, are essential to the beneficial existence and successful operation of a corporation, such as individuality and perpetuity when the grant is unlimited; the power to sue and to be sued; to have a common seal and to contract; and, in the case of a railway, to have a common stock, to construct and maintain its road, and to operate the same for the common benefit of the corporators. Certain other things, as incident to the beneficial use of these franchises, are necessarily implied. But there is a wide field of debatable ground outside of all these. It is conceded that the powers expressly, or by necessary implication, conferred by the charter, and which are essential to the successful operation of the corporation, are inviolable. The Supreme Court of Ohio, in Mechanics' & Traders' Bank *v.* Debolt, 1 Ohio N. S. 591, have even denied this, and in argument assume the right of the legislature to repeal the charter of banking corporations. So also in Toledo Bank *v.* Bond, id. 622. But these cases involve only the right of the legislature to grant away permanently, for a consideration, the right of taxation, which seems to me not to involve the general question.

"But it has sometimes been supposed that corporations possess a kind of immunity and exemption from legislative control, extending to every thing materially affecting their interests, and where there is no express reservation in their charters. It was upon this ground that a perpetual exemption from taxation was claimed in Providence Bank *v.* Billings, 4 Pet. U. S. 514, their charter being general, and no power of taxation reserved to the state. The argument was, that the right to tax either their property or stock was not only an abridgment of the beneficial use of the franchise, but if it existed, was capable of being so exercised as virtually to destroy it. This was certainly plausible, and the court do not deny the liability to so exercise the power of taxation as to absorb the entire profits of the institution. But still they deny the exemption claimed. Chief Justice *Marshall* there says, 'The great object of an incorporation is, to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, *but must be expressed in it, or they do not exist.*'

"This is sufficiently explicit, and upon examination will be found, I think, to have placed the matter upon its true basis. In reason it would seem no fault could be found with the rule here laid down by the great expounder of American constitutional law. As to the general liability to legislative control, it places natural persons and corporations precisely upon the same ground. And it is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based.

"To apply this rule to the present case, it must be conceded that all which goes to the constitution of the corporation and its beneficial operation is granted by the legislature, and cannot be revoked, either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States constitution. And if we suppose the legislature to have made the same grant to a natural person which they did to defendants,

cipal being irredeemable for thirty years, and it was provided that the amount of A.'s claim should be determined by * B., and it was

which they may undoubtedly do (Moor v. Veasie, 32 Maine, 343; s. c. in error in the Sup. Ct. U. S. 4 Pet. 568), it would scarcely be supposed that they thereby parted with any general legislative control over such person or the business secured to him. Such a supposition, when applied to a single natural person, sounds most absurd. But it must in fact be the same thing when applied to a corporation, however extensive. In either case the privilege of operating the road and taking tolls, or fare and freight, is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would, no doubt, be void. But beyond that the entire power of legislative control resides in the legislature, unless such power is expressly limited in the grant to the corporation, as by exempting their property from taxation in consideration of a share of the profits, or a bonus, or the public duties assumed. And it has been questioned how far one legislature could, in this manner, abridge the general power of every sovereignty to impose taxes to defray the expense of public functions. Brewster v. Hough, 10 N. H. 138; Mechanics' and Traders' Bank v. Debolt, 1 Ohio N. S. 591; Toledo Bank v. Bond, id. 622. It seems to me there is some ground to question the right of the legislature to extinguish, by one act, this essential right of sovereignty. I should not be surprised to find it brought into general doubt. But at present it seems to be pretty generally acquiesced in. State of New Jersey v. Wilson, 7 Cranch, 164; reaffirmed in Gordon v. Appeal Tax Court, 3 How. 133. But all the decisions in the United States Supreme Court, allowing the legislature to grant irrevocably any essential prerogative of sovereignty, require it to be upon consideration, and in the case of corporations, contemporaneous with the creation of the franchise. Richmond Railw. Co. v. The Louisa Railw. Co., 13 How. 71. Similar decisions in regard to the right of the legislature to grant perpetual exemption from taxation to corporations and property, the title to which is derived from the state, have been made by this court, Herrick v. Randolph, 13 Vt. 525, and in some of the other states, Landon v. Litchfield, 11 Conn. 251, and cases cited; O'Donnell v. Bayley, 24 Miss. 386. But these cases do not affect to justify even this express exemption from taxation being held inviolable, except upon the ground that it formed a part of the value of the grant, for which the state received or stipulated for a consideration.

"But in the present case the question arises upon the statute of 1850, requiring all railways in the state to make and maintain cattle-guards at farm-crossings, and until they do so, making them liable for damage done to cattle by their engines, by reason of defect of fences or cattle-guards. The defendants' charter required them to fence their road, but no express provision is made in regard to cattle-guards. There is no pretence of any express exemption in the charter upon this subject, or that such an implied exemption can fairly be said to form a condition of the act of incorporation, unless every thing is implied by grant, which is not expressly inhibited; whereas the true rule of construction in regard to the powers of corporations is, that they are to take nothing by intendment, but what is necessary to the enjoyment of that which is expressly granted. In addition to the cases already cited, we may here refer to the language of the

held that it was not competent for the legislature to provide, by subsequent statute, for referring A.'s claim to other * arbitrators

opinion of *Grier*, Justice, in Richmond Railw. Co. *v.* The Louisa Railw. Co., 13 Howard, 71, citing from the former decisions of the court, with approbation 'that public grants are to be construed strictly, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing but what is clearly given by the act.' This being the definitive determination of the court of last resort, upon this subject, in so recent a case, should be regarded as final, if there be any such thing anywhere. And the language of *Taney*, Ch. J., in Charles River Bridge *v.* Warren Bridge, 11 Peters, 548, is still more specific, and, in my judgment, eminently just and conservative: 'The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to privileged corporations.' The conclusion of this learned judge and eminent jurist is, that no claim in any way abridging the most unlimited exercise of the legislative power over persons, natural or artificial, can be successfully asserted, except upon the basis of an express grant, in terms, or by necessary implication.

"But upon the principle contended for in Providence Bank *v.* Billings & Pitman, 4 Peters, Sup. Ct. R. 514, and sometimes attempted to be maintained in favor of other corporations, most of the railways in this state would be quite beyond the control of the legislature, as well as to their own police, as that of the state generally. For in very few of their charters are these matters defined, or the control of them reserved to the legislature. Many of the charters do not require the roads to be fenced. But in Quimby *v.* The Vermont Central Railroad Co., 23 Vt. 387, it was considered that the corporation were bound, as a part of the compensation to land-owners, either to build fences or pay for them. The same was held also in Morss *v.* Boston and Maine Railw., 2 Cush. 536. Any other construction will enable railways to take land without adequate compensation, which is in violation of the state constitution, and would make the charter void to that extent. So, too, in regard to farm-crossings, the charters of many roads are silent. And it has been held, that the provision for restoring private ways does not apply to farm-crossings. But the railways, without exception, built farm-crossings, regarding them as an economical mode of reducing land damages, and they are now bound to maintain them, however the case might have been if none had been stipulated for, and the damages assessed accordingly. Manning *v.* Eastern Counties Railw. Co., 12 M. & W. 237. So, too, many of the charters are silent as to cattle-guards at road-crossings, but the roads generally acquiesced in their necessity, both for the security of property and persons upon the railway and of cattle in the highway. For it has been held that this provision is for the protection of all cattle in the highway. Fawcett *v.* The York and North Midland Railw. Co., 2 Eng. Law & Eq. 289; Trow *v.* Vermont Central Railw. Co., 24 Vt. 487. Thus, making a distinction in regard to the extent of the liability of railways for damages arising through defect of fences and farm-crossings and cattle-guards at those points, and those which arise from defect of fences and cattle-guards at road-crossings, the former being only for

than the one named in the first act, and making it a charge on the same fund, without the consent of the other creditors.

the protection of cattle rightfully in the adjoining fields, as was held in Jackson *v.* Rut. & Bur. Railw. Co., 25 Vt. 150, and the other for the protection of all cattle in the highway, unless perhaps in some excepted cases amounting to gross negligence in the owners. And there can be no doubt of the perfect right of the legislature to make the same distinction in regard to the extent of the liability of railways, in the act of 1850, if such was their purpose, which thus becomes a matter of construction.

"But the present case resolves itself into the narrow question of the right of the legislature, by general statute, to require all railways, whether now in operation or hereafter to be chartered or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road-crossings, under penalty of paying all damage caused by their neglect to comply with such requirements. It might be contended that cattle-guards are a necessary part of the fence at all crossings, but that has been questioned, and we think the matter should be decided upon the general ground. It was supposed that the question was determined by this court in Nelson *v.* Vermont and Canada Railw., 26 Vt. 717. The general views of the court are there stated as clearly as it could now be done, but as the general question is of vast importance, both to the roads and the public, and has been urged upon our consideration, we have examined it very much in detail.

"We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free states, and which is, by the fifth article of the bill of rights of this state, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free states, and which cannot, therefore, be violated so as to deprive the legislature of the power, even by express grant to any mere private or public corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railways to be carried into effect by their by-laws and other regulations, it is of course always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of if they would.

"This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non lædas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railways are concerned, this police power, which resides primarily and ultimately in the legislature, is twofold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes and by their officers. We apprehend there can be no manner of doubt that the

* 4. Under the usual legislative reservation of the power to alter, modify, or repeal the charter of a railway company, it has * been

legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railways in the state to establish and maintain the same kind of police which is now observed upon some of the important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all their railways to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railway. And by parity of reason may all railways be required so to conduct themselves as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

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

"2. There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: 1. That it subjects corporations to virtual destruction by the legislature; and 2. That it is an attempt to control the obligation of one person to another in matters of merely private concern.

"The first point has been already somewhat labored. It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use. Armington *v.* Barnet, 15 Vt. 745; West River Bridge Co. *v.* Dix, 16 Vt. 446; s. c. in error in the United States Sup. Court, 6 Howard, 507; 1 Shelford (Bennett's ed.), 441, and cases cited.

"The legislature may, no doubt, prohibit railways from carrying freight which is regarded as detrimental to public health or morals, or the public safety generally, or they might probably be made liable as insurers of the lives and limbs of passengers as they virtually are of freight. The late statute, giving relatives the right to recover damages where a passenger is killed, has wrought a very im-

* 435, 436

considered that the legislature cannot impose pecuniary burdens upon the company of a character different from any * others in the

portant change in the liability of railways, ten times as much, probably, as the one now under consideration ever could do. And I never knew the right of the legislature to impose the liability to be brought in question.

"But the argument that these cattle-guards at farm-crossings are of so private a character as not to come within the general range of legislative cognizance, seems to me to rest altogether upon a misapprehension. It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference, in regard to its character or validity, whether it will be likely to reach one case or ten thousand. A statute requiring powder-mills to be built remote from the villages or highways, or to be separated from the adjoining lands by any such muniment as may be requisite to afford security to others' property or business, would probably be a valid law if there were but one powder-mill in the state, or none at all, and notwithstanding the whole expense of the protection should be imposed upon the proprietor of the dangerous business. And even where the state legislature have erected a corporation for manufacturing powder at a given point, at the time remote from the inhabitants, if in process of time dwellings approach the locality, so as to render the further pursuit of the business at that point destructive to the interests of others, it may be required to be suspended or removed, or secured from doing harm, at the sole expense of such corporation. This very point is, in effect, decided in regard to Trinity Church Cemetery, which is a royal grant for interment, securing fees to the proprietors, in the case of Coates *v.* The City of New York, 7 Cowen, 604; and in regard to The Presbyterian Brick Church Cemetery in their case *v.* The City of New York, 5 Cowen, 538.

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

charter, as requiring them to cause a proposed new street or highway to be taken across their track, and to * cause the necessary ex-

a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business with equal power to pursue and to accomplish it, which, I trust, has been sufficiently denied.

"I do not now perceive any just ground to question the right of the legislature to make railways liable for all cattle killed by their trains. It might be unjust or unreasonable, but none the less competent. Girtman *v.* The Central Railroad, 1 Kelley (Georgia), 193, is sometimes quoted as having held a different doctrine, but no such point is to be found in the case. The British Parliament for centuries, and most of the American legislatures, have made the protection of the lives of domestic animals the subject of penal enactment. It would be wonderful if they could not do the same as to railways, or if they could not punish the killing, by requiring them to compensate the owner, or, as in the present case, to do it until they used certain precautions in running their trains, to wit: maintained cattle-guards at road and farm-crossings.

"There are some few cases in the American courts bearing more directly upon the very point before us. In Suydam *v.* Moore, 8 Barbour, 358, the very same point is decided against the railway. *Willard*, J., compares the requirement to the law of the road, the passing of canal boats, and keeping lights at a given elevation in steamboats, and says it comes clearly within the maxim, *Sic utere tuo ut alienum non lædas;* and in Waldron *v.* The Rensselaer & Saratoga Railw., id. 390, the very same point is decided, and the same judge says the requirements of the new act, which is identical with our statute of 1850, as applied to existing railways, 'are not inconsistent with their charter, and are, in our judgment, such as the legislature had the right to make.' They were designed for the public safety as well as the protection of property. In Milliman *v.* The Oswego & Syracuse Railw., 10 Barb. 87, the ground is assumed that the new law was not intended to apply to existing roads. And no doubt is here intimated of the right of the legislature to impose similar regulations upon existing railways. The New York Revised Statutes subject all corporate charters to the control of the legislature, but it has been there considered, that this reservation does not extend to matters of this kind, but that the right depends upon general legislative authority. The case of The Galena & Chicago Union Railw. *v.* Loomis, 13 Illinois, 548, decides the point, that the legislature may pass a law requiring all railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade. The court say, 'The legislature has the power, by general laws, from time to time, as the public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety. The provision in question is a mere police regulation, enacted for the protection and safety of the public, and in no manner interferes with or impairs the powers conferred on the defendants in their act of incorporation.' All farm-crossings in England are required to be above or below grade, so as not to endanger passengers upon the road, and so of all road-crossings there, unless protected by gates. I could entertain no doubt of the right of the legislature to require the same here as to all railways, or even to subject their operations to the control of a board of

cavations, embankments, and other work to be done at their own expense.[5]

commissioners, as has been done in some states. In Benson *v.* New York City, 10 Barbour, 223, it was held, that a ferry, the grant to which was held under the authority of the state, but from the city of New York, and which was a private corporation, as to the stock, might be required by the legislature to conform to such regulations, restrictions, and precautions as it deemed necessary for the public benefit and security. The opinion of *Woodbury*, J., in East Hartford *v.* Hartford Bridge Co., 10 Howard 511, assumes similar grounds, although that case was somewhat different. The case of Swan *v.* Williams, 2 Michigan, 427, denies that railways are private corporations. But that proposition is scarcely maintainable, so far as the pecuniary interest is concerned. If the stock is owned by private persons, the corporation is private so far as the right of legislative control is concerned, however public the functions devolved upon it may be. The language of *Marshall*, Ch. J., in Dartmouth College *v.* Woodward, 4 Wheaton, 518, 629, seems pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts: 'That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted.' And equally pertinent is the commentary of Parsons on Contracts, vol. 2, 511 (2d Edition), upon the provision of the United States Constitution in relation to the obligation of contracts. 'We may say that it is not intended to apply to public property, to the discharge of public duties, to the possession or exercise of public rights, nor to any changes or qualifications in any of these, which the legislature of any state may at any time deem expedient.'

"We conclude, then, that the authority of the legislature to make the requirement of existing railways, may be vindicated, because it comes fairly within the police of the state; 2. Because it regards the division fence between adjoining proprietors; 3. Because it properly concerns the safe mode of exercising a dangerous occupation or business; and 4. Because it is but a reasonable provision for the protection of domestic animals, all of which interests fall legitimately within the range of legislative control, both in regard to natural and artificial persons."

The same rule is adopted in Bulkley *v.* N. Y. & N. H. Railw. Co., 27 Conn. 479. See also Conn. & Pass. Railw. Co. *v.* Holton, 32 Vt. 43. And a clause giving to a railway company the fee-simple in the track and the exclusive use and occupation of the same, and providing that no person or body politic or corporate should interfere therewith or do any thing to detract from the profits of the company, will not exempt such company from the operations of the statute making railway companies liable for cattle killed on their track. Indianapolis, &c. Railw. *v.* Kercheval, 16 Ind. 84. And see Judson *v.* N. Y., &c. Railw., 29

[5] Miller *v.* New York and Erie Railw., 21 Barb. 513. In Lee & Co.'s Bank, 21 N. Y. 9, the court intimate that under such a reservation the charter may be revoked or altered by a change in the constitution of the state as well as by legislative action.

*5. And where the charter of a railway company expressly exempts it from legislative control, the legislature may neverthe-

Conn. 434, 438, opinion of the court; Ohio, &c. Railw. *v.* McClelland, 25 Ill. 140; Grannahan *v.* Hannibal, &c. Railw., 30 Missouri, 546. On the same principle it is said in Galena, &c. Railw. *v.* Dill, 22 Ill. 264, that an act exempting a railway company from ringing a bell or sounding a whistle at a street crossing, is not unconstitutional. See also Veazie *v.* Mayo, 45 Maine, 560; Bulkley *v.* New York, &c. Railw., 27 Conn. 479; New Albany, &c. Railw. *v.* Maiden, 12 Ind. 10; Indianapolis, &c. Railw. *v.* McAhron, 12 Ind. 552. The last mentioned cases hold that the statute requiring railways to be fenced is in the nature of a police regulation, and could therefore be enacted after the incorporation of the road.

"NOTE. — There are some analogous subjects where legislative control has been sustained by the courts, which may properly be here alluded to. The expense of sidewalks and curb-stones in cities and towns has been imposed upon adjacent lots, chiefly for general comfort and convenience. Paxon *v.* Swett, 1 Green, 196; City of Lowell *v.* Hadley, 8 Met. 180. Matter of Dorrance Street, 4 Rhode Island, 230. Deblois *v.* Barker, id. 445. Unlicensed persons not allowed to remove house-dirt and offal from the streets. Vandine's case, 6 Pick. 187. Prohibiting persons, selling produce not raised upon their own farms, from occupying certain stands in the market. Nightingale's case, 11 Pick. 168. See also Buffalo *v.* Webster, 10 Wend. 99; Bush *v.* Seabury, 8 Johns. 419. Prohibiting the driving or riding horses faster than a walk in certain streets. Commonwealth *v.* Worcester, 3 Pick. 462. Prohibiting bowling-alleys, Tanner *v.* The Trustees of the City of Albion, 5 Hill, N. Y. 121, or the exhibition of stud-horses in public places. Nolin *v.* Mayor of Franklin, 4 Yerger, 163. The same may be said of all statutes regulating the mode of driving upon the highway or upon bridges, the validity of which has been long acquiesced in.

"The destruction of private property in cities and towns, to prevent the spread of conflagrations, is an extreme application of the rule, compelling the subserviency of private rights to public security, in cases of imperious necessity. But even this has been fully sustained, after the severest scrutiny. Hale *v.* Lawrence, and other cases upon the same subject. 1 Zabriskie, 714; 3 Zabriskie, 9; Id. 590, and cases there referred to from the New York Reports. There is, in short, no end to these illustrations, when we look critically into the police of the large cities. One in any degree familiar with this subject, would never question the right depending upon invincible necessity, in order to the maintenance of any show of administrative authority, among that class of persons with which the city police have to deal. To such men, any doubt of the right to subject persons and property to such regulations as the public security and health may require, regardless of merely private convenience, looks like mere badinage. They can scarcely regard the objector as altogether serious. And, generally, these doubts, in regard to the extent of governmental authority, come from those who have had small experience."

The power of the legislature to impose new burdens, depends, of course, upon the inquiry whether the burden will impair the essential obligation of the

less * subject the company, by a general law applicable to all railway companies, to the duty of paying laborers upon its works whose wages are in arrear and not paid by the contractors.[6]

contract, in the charter of the corporation. Washington Bridge Co. *v.* State 18 Conn. 53. Thus, in this case, the plaintiffs had a grant to build a bridge over the Housatonic River in 1802, and, by additional acts in 1808, the grant was made exclusive for six miles on the river, provided that nothing contained in the grant should be construed to impair the rights of persons navigating the river. The company built their bridge, and kept it in repair according to the terms of the charter, until 1845, when the legislature passed a resolve requiring them to construct a draw, &c., so as to admit the free and easy passage of all registered or licensed vessels, whether sail or steam vessels, through their bridge, and the act specified a certain time when the draw should be complete, and that certain commissioners should accept the same, and also gave owners of vessels aforesaid, who should be delayed or detained by the insufficiency of the draw, right to recover damages sustained thereby, of the company. And the resolve further provided, that plaintiffs should be deprived of their power to take their tolls, as formerly, until the draw should be completed, and accepted, as aforesaid. Plaintiffs having failed to comply with the resolve, on an information in the nature of a *quo warranto*, alleging delays to vessels, &c., it was held that the resolve of 1845 was not binding upon the bridge company, no reservation being made in the former acts and resolves, of power to vary or impose new burdens upon the corporation without its consent. See also Commonwealth *v.* Cullen, 13 Penn. St. 133; Bailey *v.* Railroad Corporation, 4 Harrington, 389. In the last case the company were authorized to build a bridge across a navigable stream, which would obstruct navigation therein, and a subsequent act was passed giving right of actions in cases of obstructions, which the company did not accept, and it was

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[6] Peters *v.* Iron Mountain Railw., 23 Missouri, 107, 111. And they may be required to fence their track as a public duty, but not for the benefit of the adjoining proprietors, perhaps. New Albany & Salem Railw. *v.* McNamara, 11 Ind. 543. Statutes requiring the party in interest to sue and regulating the form of giving notice to corporations, affect only the mode of process, and are valid, as to existing corporations. New Albany & Salem Railw. *v.* McNamara, *supra;* Hancock *v.* Ritchie, 11 Ind. 48.

In the State of New York, where the statute requires the officer having charge of the letting of the canals, or other public works of the state, to take a bond, with sureties, conditioned that the contractor shall pay in full, at least once in each month, "all laborers employed by him," it was held that such bond does not extend to laborers employed by sub-contractors. Nor will it make any difference in the construction of the bond, in that respect, that the contract prohibits the contractor from sub-letting the work, that the sub-contract was without the consent of the officers having the superintendence of the work, and that the work done by the laborers under the sub-contractor was estimated under the original contractor, the same as if done by laborers in his employ. *Ante*, § 141, pl. 5.

*In a case in the State of Michigan, where the charter of a railway contained an express stipulation that no other railway

held void. But as long as no rights become vested, i. e. before the company go into operation, for instance, the charter of a corporation is declared to be subject to the same legislative control as other statutes. Covington & Lexington Railw. Co. *v.* Kenton Co., 12 B. Monr. 144; 2 B. Monr. 402; Beekman *v.* Saratoga & S. Railw., 3 Paige, 45; Baltimore & Susquehanna Railw. *v.* Nesbit, 10 How. (U. S.) 395, where it is held, that until the title to lands which are in process of condemnation, for the purposes of a railway, becomes actually vested in the company, the legislature may change the mode of appraisal, no rights having as yet vested. Acts of the legislature, imposing penalties upon a railway, for violating the provisions of its charter, in regard to fares, are valid. Camden & Amboy Railw. *v.* Briggs, 2 N. J. 623. See also Roxbury *v.* Boston & Prov. Railw., 6 Cush. 424; Madison & Ind. Railw. *v.* Whiteneck, 8 Ind. 217.

In some cases in Kentucky, the subject of the inviolability of corporate franchises is much discussed. In City of Louisville *v.* The University, 15 B. Monr. 642, it was held, that a grant of land, by the city of Louisville, to the University, was an inviolable contract, both as to the city and the State; that the State had no control over the property or other essential franchises of corporations, not strictly municipal, and that even municipal corporations might hold property independent of State control, in all cases where it was not held in trust for public purposes, under the supervision of the State. And in a case in Maine, it was held that an act, general in its terms, and applicable to all railways, is, within the meaning of the act of 1831, ch. 503, empowering the legislature to modify the charters of corporations; and such act affects the charter of any railway company which contains no express limitations to the contrary, and this, though the provisions contained in the act are dissimilar to those of the act of incorporation. Bangor, Oldtown, & Milford Railw. *v.* Smith, 47 Me. 34.

And in Sage *v.* Dillard, 15 B. Monr. 340, it is held, that a reservation in a legislative charter of the power to alter, repeal, or amend the same does not imply the power to alter the vested rights acquired by the corporators under the charter, and to add new parties and managers without the consent of the corporators. But in Monongahela Nav. Co. *v.* Coon, 6 Penn. St. 379, it was held to be competent, under a similar reservation, in an amendment to the charter of a corporation accepted by the company, for the legislature to create a remedy against the corporation for damages already done.

And in a case in Maine, Norris *v.* Androscoggin Railw., 39 Me. 273. it was held, that a general statute, subjecting railways which were required to fence their roads by their charters to a penalty of one hundred dollars for each month's delay, after certain steps had been taken by the land-owners, as it was a "remedial statute, passed for the effectual protection of property peculiarly exposed by the introduction of the locomotive engine, applied to corporations existing before its passage." Lyman *v.* Boston & Worcester Railw., 4 Cush. 288.

So a statute appointing commissioners to fix the compensation which shall be paid for drawing passengers of another company over its road, is no infringement

* crossing within certain prescribed distances of the route of the first grant should ever be chartered by the legislature, it was held to apply only to one continuous road connecting the prohibited points, and not to separate roads, one of which should start from or reach one of the prohibited points, and others start from or reach other prohibited points, although all the several roads so granted, when combined, would constitute a continuous route through the points prohibited.[7]

6. As many private railway companies in this country have been sustained, to a great extent, by public patronage in the form of legislative grants, either state or national, in lands or by way of loans, subscriptions to stock, guaranty of securities, or otherwise, the question of the consequent right of legislative interference will be likely to arise hereafter in different forms and upon various grounds or pretexts. The general question is undoubtedly one of interest and importance; and as it has hitherto arisen chiefly in regard to private eleemosynary corporations whose functions and duties are public and whose funds have often been derived from public grants, it may not be altogether * inappropriate here to refer to some of the cases which have arisen in that connection, as the question of the right of legislative control is substantially the same there as in the case of railway corporations, and the reason and ground of the claim very analogous.[8]

of the rights secured in its charter for regulating tolls on its road. Vermont & Mass. Railw. *v.* Fitchburg Railw., 9 Cush. 369. So also it was held by the New York Court of Appeals, Staats *v.* Hudson River Railw., 40 N. Y. (3 Keyes) 196, that the general statute of 1850, requiring railways to maintain along the sides of their roads fences, with openings or gates or bars therein, for the use of adjoining proprietors, was not in conflict with the special charter of the defendants, whereby adjoining land-owners are allowed to maintain gates or bars in the fences along the lines of their land, as this imposed no duty of making such openings, but left it entirely optional, this latter being for the accommodation of the land-owners, and the former a police regulation for the security of travellers generally.

See also Baker *v.* Boston, 12 Pick. 184, 194; Vanderbilt *v.* Adams, 7 Cowen, 349; State *v.* Kirkwood, 14 Iowa, 162; *ante*, § 78, pl. 4.

[7] Michigan Central Railw. *v.* Michigan Southern Railw., 4 Mich. 361. If this point is correctly stated, it seems to be in conflict with the prevailing doctrines. Two of the judges dissented upon that ground.

[8] The distinction between the inviolability of the rights and immunities attaching to public and private corporations is extensively discussed in a late case in New Jersey, Tinsman *v.* The Belvidere Delaware Railw., 2 Dutcher, 148. It is there held, that railway corporations are strictly private, although performing

7. It was decided in a recent case[9] in Connecticut, that a corporation, empowered to build a railway terminating in the city of New Haven, provided that, in constructing their road within the city, the company should be subject to such regulations as the common council should prescribe, after they had constructed their road and built bridges over the same within the city to the acceptance of the city, and where subsequently the legislature had by statute empowered the common council to order the bridges widened in such a manner as public convenience might require, and to enforce such order, that the act was not unconstitutional, either as impairing the obligation of contracts, or taking private property for public use without compensation. The decision is placed mainly upon the ground that the legislature * retained by express reservation the right to amend or repeal the charter of this company. But it seems to us, upon general grounds, that the statute in question was nothing more than the exercise of ordinary legislative powers in maintaining the police of the state. It is here said that the common council of the city had no such interest in the question as disqualified them to act.

8. In a late case[10] it was held, that a summary remedy against defaulting stockholders, given by the charter of a corporation, is

many important public functions, and invested with prerogative franchises, to a certain extent, so far as the construction of their works is concerned, but that these companies do not possess the same immunity from liability to make compensation for private damage, caused by the construction and operation of their works, which would attach to persons in the execution of a strictly public trust, for the public benefit. It is considered that these companies' works being constructed by private capital for private emolument, the companies must be subject to the ordinary liability of private persons, for all such acts as are not expressly, or by necessary implication, conceded to them, on behalf of the sovereignty, by their charter powers. It is said here, that public corporations are such only as are created for political purposes, to carry forward the functions of the state; over public corporations the legislature have an unlimited control, to create, modify, or destroy, at pleasure, but the grant and acceptance of a private charter is a compact which the legislature cannot violate; the liability of the corporation for damages does not depend upon whether it is public or private, but whether the franchise is created for private emolument or exclusively for the public good. *Ante*, § 75, pl. 2, and notes. But an incorporated academy, whose endowment comes exclusively from the state, has been held subject to legislative control. Dart *v.* Houston, 22 Ga. 506. And see opinion in the case of Trinity Church, in SUPPLEMENT.

[9] English *v.* New Haven & Northampton Co., 32 Conn. 240.

[10] N. E. & S. W. Alabama Railw. *ex parte*, 37 Ala. 679.

no part of the corporate franchise, and may be subsequently modified by the legislature.

9. And it has been held, that a statute providing compensation to the owners of animals killed or injured on railways by the passing trains, are so far in the nature of general police regulations as to come within the legitimate range of legislative action, and are equally binding upon existing corporations as upon those subsequently created.[11]

And a statute giving the representatives of persons killed a right of action to the same extent they would have had if in life, is no violation of the charter of railways before incorporated.[12] But it has been held that a statute, allowing the gates of a plank-road company to be thrown open upon the report of commissioners that it was out of repair, was unconstitutional.[13]

*SECTION III.

Construction of exclusive Railway Grants.

1. *Such grants are to receive a strict construction in favor of the company.*
2. *How far such companies can claim under implied grant.*
3. *Ambiguous terms construed most strongly against the company.*
4. *Construction of statutes conferring powers for the public good more liberal than those conferring powers for private profit.*
5. *Legislature may remedy defects in organization.*

§ 233. 1. The principle that exclusive grants, in derogation of common right, are to be strictly construed, is a principle of statutory exposition and construction as old almost as the English common law. And it has received frequent applications to railway charters, and especially in regard to those exclusive grants, by which subsequent similar incorporations are prohibited.[1] It was

[11] Ind. &c. Railw. *v.* Kercheval, 16 Ind. 84. This question is here considerably discussed with reference to the effect of such enactments subsequent to the creation of the corporation.

[12] Southwestern Railw. *v.* Paulk. 24 Ga. 356. See also Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120.

[13] Powell *v.* Sammons, 31 Ala. 552. But this seems a questionable decision.

[1] Bradley *v.* New York and New Haven Railw., 21 Conn. 294; Boston & Lowell Railw. *v.* Andover and Wilmington Railw., 5 Cush. 375; Brocket *v.* Ohio and Penn. Railw., 14 Penn. St. 241; 6 Paige, 554. And the same doctrine has been maintained in the supreme federal court. Rice *v.* Railway Co., 1 Black (U. S.), 358; Jefferson, &c. Bank *v.* Skelly, id. 436.

held, that where a railway charter gave the company "authority to vary the route and change the location after the first selection had been made, whenever a cheaper and better route could be had, or whenever any obstacle to the location was found, either by difficulty of construction or procuring right of way at reasonable costs, that authority was not thereby conferred upon the company to relocate their road after it was finished."[2]

2. So, too, a stipulation in the charter of a railway that no other one shall be granted from one terminus to any place within five miles of the other terminus, is not violated by the grant of * a railway from one terminus of the former one to a point coming within the space included by two straight lines, drawn from the former terminus of the first road to points five miles distant from the other terminus, upon opposite sides but not within five miles of the actual terminus of the first road.[3] But although a railway company cannot ordinarily claim an extension of its franchises by implication, it does take by implication, such powers as are indispensable to the enjoyment of those expressly granted.[4]

[2] Moorhead *v.* Little Miami Railw., 17 Ohio, 340. In Milnor *v.* The New Jersey Railw., 6 Am. Law Reg. 6, it was decided that the mere establishment of a particular line of road, and erection of a bridge in a particular location, in a town, by a railway company, after a controversy with the inhabitants with respect thereto, does not amount to a contract so as to preclude the company, after a lapse of time, from changing the direction of their line and the position of the bridge. See, upon this point, Glover *v.* Powell, 2 Stockton's Ch. 211; *Ante*, § 78, pl. 4.

[3] Boston & Lowell Railw. *v.* Andover & Wilmington Railw., 5 Cush. 375. And a like principle of construction was adopted in the case of Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210. It was here held, that a legislative provision that the ferries between Hartford and East Hartford should be discontinued, and said towns never afterwards permitted to transport passengers across the river, meant only that the then existing ferries should be discontinued, and the towns not allowed to revive them, and was not abrogated by the establishment of a ferry between those same towns, but accommodating a different line of travel from that which naturally flowed to the bridge. 29 Conn. 210.

[4] Enfield Toll-Bridge Co. *v.* H. & N. H. Railw., 17 Conn. 454; Springfield *v.* Conn. River Railw., 4 Cush. 63; White R. T. Co. *v.* Vt. C. Railw., 21 Vt. 595; State *v.* Baltimore and Ohio Railw., 6 Gill, 363. In this case it was held, that the directors being the sole judges of the propriety, and the means of declaring dividends, could not lawfully declare a money dividend of $3 to all stockholders of less than fifty shares each, and $1 in money and $2 in the bonds of the company to those having more than fifty shares. But a right of ferry which is optional with the grantee, and may be discontinued by him at any moment, and exists only upon Sundays, is not to be regarded as an ancient ferry, as the ground of

3. And the same rule applies to the grant of lands for the purpose of a railway, even where the necessary use should involve the extension of ditches upon other lands of the grantor.[5] And ambiguous words are to be construed most strongly against the company.[6] But the right to take lands, or the right of way required for the purpose of constructing the roads, must include land for stations and other necessary works connected with the operation of the road.[7]

4. The construction of statutes conferring powers upon a corporation for the benefit of the community, should be much more enlarged and liberal for the purpose of accomplishing the general object proposed, than where powers are conferred upon a private * corporation for purposes of trade and business for profit, and in derogation of the rights of those whose property or business is affected thereby.[8] Hence where the statute gave the Metropolitan Board of Works power to carry sewers into, through, or under any land subject only to making compensation for any damages done, it was held the board could not, under the Land Clauses Consolidation Act, be compelled to purchase the land or any easement therein.[8]

5. It has been held that the legislature have such power over corporations that they may remedy any defect in their organization.[9]

SECTION IV.

Discrimination as to Freight.

1. *Discrimination between freight not prohibited by the United States Constitution.*
2. *Tax upon the tonnage of railways brought from other states.*
3. *Tax on passengers going out of the state unconstitutional.*

§ 233 *a*. 1. The Constitution of the United States does not prohibit a discrimination between local freight and that which

enjoining others of a similar character. Letton *v*. Goodden, Law Rep. 2 Eq. Cas. 123.

[5] Babcock *v*. The Western Railw., 9 Met. 553.

[6] Perrine *v*. Chesapeake and Delaware Canal Co., 9 How. (U. S) 172; Jefferson Branch Bank *v*. Skelly, 1 Black (U. S.), 436.

[7] Nashville and C. Railw. *v*. Cowardin, 11 Humphrey, 348.

[8] North London Railw. Co. *v*. Metropolitan Board of Works, 1 Johns. Eng. Ch. 405; s. c. 5 Jur. N. S. 1121.

[9] Illinois Grand Trunk Railw. Co. *v*. Cook, 29 Ill. 237.

comes from another state; the distinction not being personal, is not within the prohibition.[1] This decision seems to go solely upon the ground of the rights of citizens in one state having the rights of citizens in all the states. But a discrimination in freight, made expressly on the ground of the residence of the consignor or owner, would unquestionably be sufficiently personal to meet the prohibition of the United States Constitution.

2. There has been some question made in regard to one state having the power to tax the tonnage of railways coming from other states. There is an able and learned opinion of the common pleas of Dauphin County, Pennsylvania, by Judge *Pearson*, upon the question, in which he declares that the Pennsylvania statute does not come within the prohibition of the United States Constitution; it being only a legitimate mode of taxing the business and profits of railway companies.[2]

3. But the United States supreme court have recently held that a special tax on railway and stage companies for every passenger carried out of the state by them is a tax on the passenger for the privilege of passing out of the state by the ordinary modes of travel, not a simple tax on the business of the companies, and is unconstitutional and void.[3]

[1] Shipper *v.* Philadelphia Railw. Co., 47 Penn. St. 338.

[2] That portion of the opinion bearing upon this point affords a valuable commentary upon the law affecting these questions of taxation.

[3] Crandall *v.* Nevada, 6 Wall. U. S. 35.

*CHAPTER XXXIII.

RAILWAY INVESTMENTS.

SECTION I.

Power of Company to do Acts affecting the Value of their Stock and Bonds. Over-issue of Stock.

1. *The importance and unsettled state of the law upon the subject.*
2. *The English statute requires the stock subscriptions to precede the grant.*
3. *Duty of railway directors, in regard to speculations in shares.*
4. *Nature and effect of desperate financial expedients in building railways.*
   (1). *Issuing stocks in railways, at different prices, fraudulent.*
   (2). *Mode of issuing bonds and mortgages objectionable.*
5. *Difficulty of preventing this by legislative restrictions, no excuse.*
6. *Something might be effected by legislation.*
7. *These losses fall severely upon small owners.*
8. *Over-issue of stocks somewhat of a similar character.*
9. *Case of New York and N. H. Railway before Superior Court.*
10. *Same case before the Court of Appeals.*
11. *The principles involved in similar cases.*
12. *Right of canal company to mortgage tolls without consent of legislature.*
13. *New company, formed after sale on mortgage, succeed to rights of old company.*
14. *Parol gift of railway debentures, where act of Parliament requires deed duly stamped.*
15. *Such gift by parol lately maintained in England.*

§ 234. 1. THERE is perhaps no subject connected with the law of railways which comes home so directly to the pecuniary interests of so large a number of persons in this country as that of railway investments in the various forms of stock, original and preferred, and bonds and mortgages. But it will not be in our power to give much information upon the subject, and none probably which will afford relief to those who have adventured their money in these enterprises which so generally, in this country, have proved unproductive. But few questions, in regard to the subject, have yet been definitely settled, in this country, and these, for the most part, are of secondary importance in comparison of those which yet remain unsettled.[1]

* 2. This subject is incidentally alluded to in former portions of

[1] *Ante*, §§ 17, 41, 55, 56, 59.

the work.[1] In England the provisional committees of the promoters of railways issue scrip certificates, which are publicly sold at the stock-exchange,[2] and pass from hand to hand, by delivery,[2] without the necessity of formal transfers or stamps.[3] The holders of these scrip certificates ordinarily have their names entered upon the registry of shareholders, after the act of incorporation is obtained, and thus constitute the members of the corporation, and are liable for calls.[4]

3. We have seen, too, that all speculating practices by the directors of a railway, or other business corporation, with a view to raise the market value of shares, are fraudulent, and will be relieved against in equity, and the participators punished criminally.[5]

4. There have been some expedients resorted to for the purpose of enabling companies to complete their works, without the requisite capital, *bona fide* subscribed and paid in, which, as they do not seem to have come much under discussion, in the judicial tribunals of the country, we could do little more than allude to, but which have so serious a bearing upon the safety and permanent value of railway investments, that we could not, perhaps, with perfect propriety, altogether pass over them.

(1). Where the charter of a railway company does not limit the amount of capital, except by the necessity of the undertaking, as the work progresses the stock naturally becomes more or less depreciated in the market, and it has sometimes been the practice of the directors, either with or without a vote of the shareholders, to issue shares at a reduced price, so much below the market price as to induce sales. And sometimes such an expedient has been repeated, according to the necessities of the case and the desperate fortunes of the enterprise. Such practices cannot fail to strike all minds alike as desperate financial expedients,[6] * and

[2] London Grand Junction Railw. Co. *v.* Freeman, 2 Man. & Gran. 638, 639; Jackson *v.* Cocker, 4 Beav. 59; s. c. 2 Railw. C. 368, 372; Hesseltine *v.* Siggers, 1 Exch. 856.

[3] Willey *v.* Parratt, 6 Railw. C. 32; s. c. 3 Exch. 211; Vollans *v.* Fletcher, 1 Exch. 20; Moore *v.* Garwood, 4 Exch. 681.

[4] *Ante*, §§ 29, 53. *Ante*, § 2. [5] *Ante*, §§ 41, 59, 241.

[6] Herrick *v.* Vermont Central Railw., 27 Vt. 673, 692. Opinion of court: "This building railways at vast expense, with no adequate means, is desperate business, and I do not think we should be surprised to find desperate efforts and desperate expedients resorted to by the best of men, whose very lives and all earthly hopes stand upon the event of their success or failure." But the courts

more or less fraudulent in their operation upon the market value of stock sold at a higher price. But we see no reason to * doubt

have felt compelled to recognize them as valid and binding unless resisted in a formal and judicial mode. The case of Faulkner v. Hebard, 26 Vt. 452, may be of interest in this connection: "Where F. & H. entered into a written contract, by the terms of which H., in consideration of a certain number of shares of stock in the Vermont Central Railw. Co. 'to be delivered to me (H.) by F. on or before the first day of July, 1850,' agreed to sell and convey certain property to F., and this contract was signed by both parties. *Held*, that the contract was upon sufficient consideration; and that both parties are bound to do what is specified in the contract to be done on his part; and that if F. had declined to deliver the stock according to the terms of the contract, an action would lie upon the contract, for the refusal.

"And in such a contract the delivery of the stock and the conveyance of the property are *concurrent acts:* and as the one promise is the entire consideration of the other, neither party would be bound to convey absolutely his property except upon the conveyance by the other.

"But either party, claiming damages for non-fulfilment of the contract, must either show a readiness and offer to perform on his part, or that he was excused therefrom by the consent or the conduct of the other party.

"The directors of the railway company, before the sale, but without the knowledge of the parties, by letting in those who paid but $30, to an equal participation in the profits of the company with those who paid $100, lessened the market value of the stock which F. by the contract sold to H.; *it was held*, that if this act of the directors was a legal one, then it was one which H. was bound to know they might do, and would therefore form one of the contingencies of H.'s purchase; and whether the act of the directors was before or after the actual time of sale, would no more affect the validity of the sale than any other legal act of theirs; but if the act was an unlawful exercise of authority by the directors, then H. when he became a stockholder might resist it in any legal way; and therefore it will form no defence for H. in a suit for non-performance of the contract." In giving judgment, the court say: —

"But the important question in this case is, whether the plaintiff can recover at all. The finding of the jury negatives all fraud or intentional misrepresentation on the part of the plaintiff, or even knowledge of the circumstance, which it is claimed should exonerate the defendant from his contract. The only question then is, whether the parties were under such a mutual misapprehension in regard to the actual state of the subject-matter of the contract, at the time of entering into it, as will relieve the defendant from the obligation of it. This is a familiar ground of relief from the performance of contracts in a court of equity, and, as a general thing, confined mainly to that forum. But in some few cases it has been allowed as a defence at law. The case of Ketchum v. Catlin, 21 Vt. 194, has perhaps gone to the full extent of such relief, in a court of law, and may be regarded as laying down the law, as it now stands, in regard to defence at law to contracts, on the ground of mutual misunderstanding in regard to the state of the subject-matter at the time. And this case goes upon the ground, that to constitute a defence at law such subject-matter must be so

their binding obligation upon those who approve them by their votes, and it would seem that the minority who vote * against them

changed, at the time of the contract, without the knowledge of either party, as not in any sense, to answer the purpose for which the contract was made. This mode of defence goes upon the assumption, that if the party buys one thing, or a thing in one state, he is not bound to accept of a different thing, or the same thing in a different state. If property is sold, as being in existence, and in fact has been destroyed, or changed state, the sale will be inoperative,

"But any accidental occurrence, not directly affecting the state or quality of the thing sold, but only its market value, will have no such effect. News of peace or war, or commercial restrictions, or their modification, has often a most surprising effect upon the market value of commodities, but whether both parties, or one only is ignorant of such facts, which renders the matter more unjust and unequal, is no ground of relief even in equity, unless the one party gaining the advantage is guilty of artifice or misrepresentation. The rule of the civil law was somewhat different, and more in accordance with the rule of moral justice and equity than that of the common law. This has been with some writers a ground of reproach to the common law, as being less in accordance with the principle of Christian morality than the law of pagan Greece and Rome. And the case put in *Cicero de Officiis* is of this character, where the two cargoes of corn coming into Rhodes, in time of famine, or great want, and the one first reaching port, knowing of the near approach of the other with a large supply, the question is, whether the first is bound, before he sells his cargo, to make known the probable early arrival of the other? The Roman casuist decides that he is, and so must a Christian moralist; but the common law will not allow any such determination in a civil tribunal!

"So, too, stocks may be affected by general legislation, by the granting of other charters, by governmental negotiations, by war or peace, by the management of the corporations, by the result of an election, by the death of an important financial agent, and by a thousand other accidental matters. The question is, whether such mere accidents, not affecting the inherent quality of the stocks or essentially their actual value, can be said to create such a change of state as to justify the vendee in refusing to go forward with his contract. I have not been able to find any such case, and the books abound with those of an opposite character.

"Had this vote of the directors cancelled or annihilated the stock, it would, no doubt, have been a good ground of defence to this action within the principle of the best considered cases upon the subject. But, so far from that, it did not affect the stock in any sense, except incidentally, by its increase at a low rate. This had three accidental effects upon all the stock of the company. 1st. It showed the company to be embarrassed, if not desperate, which of itself had a tendency to lessen the market value of the stock, but not its real value. 2. It showed the probable opinion of the directors that the stock was not worth much above $30, which would have a similar effect. 3d. If it was a legal act it did tend to lessen in some degree the actual value of the stock, by letting in those who paid but $30, to an equal participation in the profits of the company with those who paid $100. But if this was a legal act, it was one which the defendant

should take measures to stop them before the stock goes into the market and falls into the hands of *bona fide* purchasers, or they will be precluded from objecting afterwards.[6] Questions of this kind will doubtless come before the courts, and we do not intend to express any very settled opinion upon them here.

(2). A very similar series of expedients is perhaps more * commonly practised by way of bonds and mortgages and preferred stock, which latter indeed amounts to much the same thing as a mortgage under a different name. In this country these mortgages have usually been so framed as to create successive liens, in the order of their being issued, as first, second, and third mortgage bonds. These are issued in large general sums, subdivided to suit the wants of purchasers in the market, and when sold at par and above, are perhaps the most unobjectionable mode of completing an enterprise that otherwise must stop *in medio*. But when sold, as they

was bound to know the directors might do, and which would therefore form one of the contingencies of his purchase, and which, whether done before or after the actual time of sale, could no more affect the validity of the sale than any other legal act of the directors. If the act was an unlawful exercise of authority by the directors, the defendant, when he became a stockholder, might resist it in any legal way.

"The length of time given the plaintiff to deliver the stock must have involved the hazard of the directors doing many things which might affect the stock, and indeed every legal act certainly, and illegal acts would not bind the stockholders. We do not see how this will form any defence to the suit, there being no fraud or misrepresentation."

In the case of Sturges *v.* Stetson, 10 Am. Railw. Times, No. 50, in the U. S. Circuit Court, Mr. Justice McLean presiding, it was recently decided, *Leavitt*, J. giving the opinion, that where the plaintiff entered into a scheme with a railway company, through the directors, to enable them to sell him shares below the par value, it was, as to the directors, *ultra vires*, and as to the other share-holders, fraudulent, and entitled them, by proper proceeding, to compel the reduction of the number of plaintiff's shares, so as to bring them to the par value.

The form of the contract in this case was that the directors executed a bond to plaintiff for $750,000, payable in five years, without interest, and convertible into stock of the company, at any time within four years, at par. This bond was sold at $521,677, and converted into stock. Subsequently the plaintiff sold $30,000 of the same stock to defendant, for which the note in suit, of $24,000, was executed.

The court held that the defendant, as a *bona fide* purchaser, might hold the stock freed of all equity in favor of the other stockholders, to have the number reduced; or he might defend against the note.

And at the same time, in Fosdick *v.* Sturges, which was an action to compel defendant to refund money received for stock sold under similar circumstances, it was held the action will lie.

commonly are, at reduced prices, in proportion to the waning fortunes of the company, they must of course destroy at once the credit of the stock and operate harshly upon its holders.

This is not the place, nor are we disposed, to read a homily upon the wisdom of legislative grants, or the moralities of moneyed speculations in stocks on the exchange or elsewhere. But it would seem that legislation upon this subject should be conducted with sufficient deliberation and firmness so as not to invest such incorporations with such unlimited powers as to operate as a net to catch the unwary, or as a gulf in which to bury out of sight the most disastrous results to private fortunes, which has justly rendered American investments, taken as a whole, a reproach wherever the name has travelled. Experience will perhaps show that desperate enterprises require desperate means for their accomplishment, and will always find men for their management whose characters will conform more or less to the necessities of their position. And if by legislative restrictions they are precluded from the more obvious devices and expedients for the relief of their straitened fortunes, they will only be forced to the adoption of such as are more complex, less superficial, and consequently the more likely to seduce inexperienced capitalists into their investments.

5. But even this is no apology for such unrestricted powers as are often given to these companies. And the mode in which such things are here carried through the legislature, by means of agents who have, where there are no rival interests, very much their own way, without even the necessity of subjecting their plans to any permanent board of supervision who shall have * such matters under control, and devote such time to their study as not to be misled by the devices of the interested; this mode of accomplishing such things sufficiently explains why, in this country, no restrictions are placed upon such companies.

6. If some reliable estimate of the cost of such undertakings were obtained, by means of a board of trade or railway commissioners, and no work allowed to go forward until a large proportion or the whole of the requisite capital were obtained by stock subscriptions, it would afford great security.[7] And if all mortgages,

[7] Both these requisites are contained in the English Railway Acts, and the standing orders of parliament. Hodges on Railways, 16–44. Companies' Clauses Consolidation Act, 8 and 9 Vict. ch. 16, §§ 42, 44; Hodges on Railways App. 73, 74.

at whatever time given, were placed upon the same footing, as to priority,[7] it would give far less temptation to speculation in mere bubble investments, which is too much the case in this country. But there is perhaps no remedy for this incautious legislation in this country but the severe and hard discipline of that most painful but surest teacher, experience. It is, we think, rather creditable to the promoters of railways in this country, that with such unlimited powers as their charters confer they have been so little abused, and this in the main not often by design or for private ends, but through inexperience and want of skill.

7. We have deemed it not improper to allude to this subject, in this connection, chiefly because of the far greater severity and extent to which such losses are felt throughout society in this country than in older states. Here we have no national funded stock in convenient sums for small investment, and which being sure is really a great blessing to the mass of those who wish to invest moderate sums, as a protection against age or calamity. In those countries where such opportunities exist, it removes all temptation to invest small sums in these enterprises, which, however necessary for the public, such small owners can but poorly afford to aid in carrying forward, and which consequently should in justice either be guaranteed or owned by the state, or at all events aided by state credit, when they become indispensable for the public convenience, but are so extensive or so * little remunerative at first as to be an unsafe undertaking for private enterprise.[8]

8. There is a class of questions, somewhat analogous to some of the foregoing, which has arisen extensively in this country, in regard to a few companies, which is denominated the over-issue of stock. By this is understood an express fraud by managing directors, or agents, in issuing stock without any authority, and in

[8] We are conscious of the very serious objections which exist practically against state management of public works. They are not likely to be as productive or as efficient under such control, and are liable, in popular governments, to serious abuse, as a medium of favoritism, nepotism, and every species of partiality, in the way of state patronage. But there should be some mode of equalizing public burdens for such works, and in practice none perhaps has operated better than the loaning of state credit, which creates a reliable stock for capitalists, small or great, and affords some security that the management will be as good as public servants can be found ready to secure, and that legislation will be more carefully watched than where the public have no interest.

many instances mere fictitious stock, after all the shares created by the charter had been issued and sold. There was a strong disposition manifested at first, among the legal profession and business men, to hold such fictitious shares, entitled to the same claim upon the funds of the company as the genuine shares, and that the only effect of the over-issue would be to diminish, in the same proportion, the amount and value of the genuine shares.

9. This opinion was based upon the view, that the company, having intrusted their agents with the means of putting such spurious stock in circulation, should be bound by their acts. This was a plausible view certainly, and the courts before which the questions first came very generally adopted it.[9]

[9] Mechanics' Bank of the City of New York *v.* N. Y. & N. H. Railw., 4 Duer, 480. The case in this court was put mainly upon the ground of the authority of the transfer agent of the company, he having certified to the genuineness of the stock, and that this being an act within the acknowledged scope of his employment, would bind the company.

And even if the company had not power to issue stock beyond the amount limited in their charter, in regard to which the court were not agreed, still the promise to issue it will bind them, and render them liable in damages, which will produce the same result as if the shares were to be held genuine.

In N. Y. & N. H. Railw. *v.* Schuyler, 38 Barb. 534, it was held, that where the capital stock of a corporation was limited by its charter to a certain number of shares, it is not in the power of the directors, by any resolution or act, to increase the number beyond that amount. Nor can they, directly or indirectly, delegate to their agent authority to make such increase. Nor will any act of negligence or misconduct of the agent effect indirectly what the corporation could not do directly. And the doctrine of estoppel cannot be applied to give validity to what would be an illegal act, or to prevent the company from setting up, in answer to a claim to stock, that the same is void, as having been issued in excess of their capital. But the court also lay down the rule that a corporation is liable for the acts of its transfer agent in issuing false certificates of stock and allowing false transfers, and for negligence on the part of the corporation and its officers in permitting transfers of spurious stock to be made on the books of the company to persons desirous of becoming stockholders therein. And a corporation is liable to respond in damages for any loss sustained either by the fraud or negligence of its agents in discharging the particular duty assigned to them; as where a company is bound to keep transfer books for the purpose of transferring stock, and on being applied to by persons about to purchase stock in the company, to know whether shares have been transferred to them, the officers and clerks give the information that shares have been so transferred, and also give the certificate thereof, on the faith of which statements money is paid; when in fact no money had been paid, and the party making the transfer had no stock to his credit to dispose of. N. Y. & N. H. Railw. *v.* Schuyler, *supra*. And see Shotwell *v.* Mali, 38 Barb. 445. It was here held that the officers of a corpora-

* 10. But subsequent investigation of the subject before the courts of final resort led to a different conclusion, especially in regard to cases of stock issued beyond the limit of the charter, and where consequently there was a defect of power in the corporation itself, to issue the stock, and also where the stock was originally transferred to one, aware of the mode in which * it was created, although subsequently coming into the hands of a *bona fide* purchaser. It was held that where the act, if done by the corporation, would have been *ultra vires*, the transaction, when done by the directors, could have no force, and even when the corporation had power, and the manner of employing the agent enabled him to bind the company in a contract with one ignorant of his bad faith, yet if the person contracted with was aware of the bad faith of the agent, he not only acquired no title to the stock, but a *bona fide* purchaser of him would stand in no better situation.[10]

tion authorized to issue certificates of stock to the shareholders as evidence of the title of stock are liable not only to the immediate purchaser from them of spurious stock, falsely and fraudulently certified by them, but to any subsequent purchaser, buying upon the faith of the false certificate, and sustaining damage thereby. And although the purchaser of spurious stock has a remedy against his vendor, for a breach of the implied warranty of title, that right of action does not constitute a bar to an action against one who has induced the purchase by a fraudulent representation that the vendor had title to the stock, whereby damage has resulted. The purchaser's right of action against the officers of a corporation concerned in the issue of spurious stock is complete from the purchase. And that right will not be affected by any subsequent action of the directors of the corporation, in turning out other property to him to an amount exceeding the cost of the false certificates. Any one furnishing to another a false and fraudulent document, purporting to show title in the latter to any property, is liable to any one sustaining damage therein. Per *Grover*, J., Shotwell *v.* Mali, *supra*. And see Cazeaux *v.* Mali, 25 Barb. 578.

[10] Mechanics' Bank *v.* N. Y. & N. H. Railw., 3 Kernan, 599. The case is here put by the court upon the following grounds: "By the act creating a corporation, its capital stock was limited to $3,000,000, and divided into shares of $100 each, transferable in such manner as the company should direct; the entire stock was taken, and certificates issued therefor to the owners; and the by-laws of the company prescribed that transfers of stock should be made on the transfer books of the company, and required the certificate of ownership to be surrendered prior to the making of such transfer and the issue of a new certificate. The company established a transfer agency, and appointed their president transfer agent, who was authorized and accustomed, on the transfer of stock on the books in his charge, and the surrender of the certificate therefor, to execute and deliver to the transferee the usual certificate, stating that he was entitled to the number of shares of stock specified therein, transferable on the books

*11. And it is, we think, impossible to doubt that the final result arrived at, is far more consonant with acknowledged prin-

of the company by him or his attorney on the surrender of the certificate; the agent fraudulently gave to one Kyle a certificate in the usual form for eighty-five shares of stock, when, in fact, the latter owned no stock, none stood on the books in his name, and no certificate for such stock had been surrendered; the plaintiffs, in good faith, and relying upon the certificate as regularly issued and valid, made a loan to Kyle, receiving from him the certificate, with an assignment of the stock and a power of attorney to transfer the same. In an action by the plaintiffs against the corporation for refusing to permit the stock represented by the certificate to be transferred on its books, or to pay its value, *Held*, that the certificate was void, and that the plaintiffs did not thereby acquire a right, legal or equitable, to any stock; and *held*, further, that the corporation was not responsible to the plaintiffs for damage sustained by dealing upon the faith of the certificate.

"Such a certificate does not partake of the character of negotiable instruments; and the *bona fide* assignee, with the power to transfer the stock, takes the certificate, subject to the equities which existed against his assignor.

"Also *held*, that, on the facts of the case, the doctrine of *estoppel in pais* was not applicable."

At a special term of the Supreme Court in New York, it was recently decided that a bill to enjoin the holders of railway bonds and other securities, which had been deposited with an agent of a railway company, with power to sell or pledge the same, for the purpose of raising money for the use of the company, and which it was alleged had been misapplied by such agent, and were now in the hands of numerous parties, upon different and independent contracts, which were severally alleged to be invalid as against the company, could not be maintained against the agent, and the several persons into whose hands he had passed the securities, there being no privity among the several defendants. But upon general principles of equity, it would seem that such a joinder amounts to multifariousness only when the securities in the hands of the different defendants are wholly distinct; in which case only the agent, and the particular person or persons obtaining each separate parcel of the securities, constituting one transfer, should be joined. But if the fund were one and inseparable, all participating in its transfer may be joined. Lexington & Big Sandy Railw. *v.* Goodman *et als.*, 9 Am. Railw. Times, No. 52.

In a case before V. C. *Stuart*, it was decided, upon great consideration, that where the directors of a joint-stock corporation issue debentures (which are, in form, the bonds of the company, but not negotiable) without complying with the requirements of the deed of settlement, in regard to borrowing money, and such securities came into the possession of *bona fide* holders, for value, without notice of any infirmity affecting them, such holder could not recover for them, as regards the great body of the shareholders. The learned Vice-Chancellor professed to base his judgment upon the authority of Ernest *v.* Nicholls, 6 H. Lord's Cases, 401.

The learned judge seems to have arrived at a similar conclusion to that stated in the text, that persons dealing in the market for the debentures of a company

ciples than the one first attempted to be maintained, and is attended with fewer embarrassments and refinements. And it is by no means certain that it is not equally in accordance with * the soundest principles of equity and moral justice. For whatever may be said of the duty of corporations to employ only reliable directors and transfer agents, and of the justice of the company being bound by their acts, within the apparent scope of their employment, all of which are in general terms most undeniable propositions, still, something is due to common prudence and reasonable caution on the part of those who deal in stocks, to see at least what the charter and books of the corporation will at once disclose to any one who will examine.

And if, instead of making reasonable examination of matters obviously within his reach, one sits down blindly to adventure millions upon a spurious issue of stock in such sums and at such times as to induce most prudent men to hesitate about its genuineness, it is perhaps not unreasonable that he should be held bound by such facts as the slightest examination must have disclosed. This is the rule in regard to most commercial and business transactions, and we see no special hardship in its application here, within reasonable limits. In a recent English case,[11] debentures, under the common seal of a joint-stock company, were given to P. in July, 1854, in pursuance of an arrangement made between him and the chairman of the directors, which was a fraud upon the company. These debentures were afterwards bought by another in the market, in the ordinary course of business. The last transfer was registered in the books of the company, and interest

of this sort, are bound to use reasonable precaution in seeing to the authenticity of the documents they are purchasing. But see Greenwood's case, 23 Eng. L. & Eq. 422; s. c. 3 De G. M. & G. 471. Athenæum Assurance Co. *v.* Pooley, 1 Giff. 102; s. c. 31 Law Times, 70. In a later English case, however, it was held, that where shares in a company have been issued fraudulently, a *bona fide* purchaser of such shares in the market, before any bill has been filed impeaching the transaction, is entitled, upon the winding up of the company, notwithstanding the fraud, and notwithstanding that he bought the shares at a very great discount, to prove on equal terms with the other shareholders of the company who have bought their shares at par; but this privilege does not extend to any person who bought the shares after the filing of the bill, unless his vendor was a *bona fide* holder of the shares before the bill was filed; and the *onus* of showing that such was the case is upon him. Barnard *v.* Bagshaw, *in re* The Lake Bathurst Australasian Gold Mining Co., 1 H. & M. 69.

[11] Athenæum Life Insurance Co. *v.* Pooley, 3 De G. & Jones, 294; *post*, § 241.

was paid to July, 1855, but the matter was not made known to the shareholders till December in that year, when an investigation of the affairs of the company took place, and further payment of interest was refused. It was held, that although the purchase was *bona fide*, for value, yet being only that of a chose in action not assignable at law, it must be taken subject to all equities attaching to it, and that, under the above circumstances, neither the registration nor the payment of interest had the effect of a confirmation of the title, and that the holder ought to be restrained from suing at law upon the debentures. This seems to be an entire confirmation of the views already stated.

12. In a recent case in Pennsylvania it is held, that a canal * company cannot, without the consent of the legislature, mortgage either its tolls, or such real estate, as is necessary for the enjoyment of its corporate franchises.[12]

13. The purchasers under a mortgage sale of a railway and all its apparatus, in conformity with the powers contained in the mortgage, and who were afterwards incorporated by a new name, succeed to all the rights vested in the old company by a deed of land for the purposes of constructing their road.[13]

14. Some questions have arisen in the English courts as to the effect of a parol gift of railway debentures where the act of parliament requires the transfer to be by deed duly stamped. The decision of Vice-Chancellor *Shadwell*, in 1846, would seem to indicate that the parol gift, with the delivery to the donee of the paper evidences of title, would have no legal effect, and that the executor of the donor was entitled to have the muniments of title restored to him, since the title of the debt had not passed.[14] But the late examination of the question in the Court of Exchequer,[15] would seem to indicate a different result.

15. In this last case, the testator, about a year and half before his death, gave the defendant two debentures, or railway mortgages, with the coupons attached, saying, "Take them and keep them for yourself, but you must give me the coupons that I may have the interest during my life," which defendant did do, keeping the debentures and coupons not due at the decease of the donor. This was an action of trover brought for the recovery of

[12] Steiner's Appeal, 27 Penn. St. 313. See this subject further discussed in § 235.

[13] Pollard *v.* Maddox, 28 Ala. 321.

[14] Searle *v.* Law, 15 Simons, 95.

[15] Barton *v.* Gaines, 3 H. & N. 387.

the debentures and coupons, in the name of the executor. A verdict passed for the plaintiff, and on a hearing before the full court, upon a rule for entering the verdict for defendant, the rule was made absolute. The views of the court do not seem to be very clear or determinate, in regard to the true ground upon which the case should rest. *Pollock*, C. B., says, "I should consider that if a person gives the parchment upon which the mortgage is written, we ought to give effect to his act as far as we can." The judges all concur to this extent. *Watson*, B., * in the course of the argument, suggests the true ground, we think. That "the debt passes in equity." No American court of equity would hesitate to give effect to the gift upon that ground; or if there is any ground of hesitation, it is one which has certainly never occurred to us.[16]

SECTION II.

Rights and Remedies of Bondholders and Mortgagees.

1. *Under English statutes tolls only mortgaged. Ejectment will not lie.*
2. *But if priority of lien is created, ejectment will lie.*
3. *The English acts allow no covenant to refund the money in railway mortgages.*
4. *But bond creditors and mortgagees, where there is no restriction, may have covenant against company.*
5. *All parties, standing in same right, necessary parties to bill.*
6. *After appointment of receiver by court of equity, counter claimants cannot contest his rights, except in court of equity, or by their permission.*
7. *Priority of right determinable only upon motion to discharge the order of appointment.*
8. *Where charter creates a lien in favor of bill-holders, this is subject to the lien of contractors for construction.*
9. *Some American cases hold railway companies may mortgage franchise without consent of legislature.*
10. *Power to buy and sell real estate, and to borrow money, implies the power to mortgage for its security.*
11. *Company receiving benefit of money estopped to deny authority of agent.*
12. *The mortgage of the property, or of the franchises, by the corporation, does not transfer the title to the corporate franchise.*
13. *Statement of a leading case in New Hampshire.*
14. *The right to mortgage subsequently acquired property maintained in equity in Kentucky.*
15. *Similar decision in equity in New Jersey.*
16. *And in the Circuit Court of the United States.*
17. *Neither sale nor foreclosure allowed in England.*
18. *Lien for construction under agreement of company with contractor, preferred to that of the mortgagees.*

§ 235. 1. The remedies under railway mortgages will depend very much, of course, upon the powers granted by the legislature,

[16] *Ante*, § 35; *post*, § 239.

and the forms of the contracts by which the mortgages are created. By the English acts more commonly it is only the tolls, and accruing profits of the road, and future calls, which are allowed to be mortgaged.[1] Under these mortgages it was *decided that the mortgagee could not maintain ejectment, even where the deed purported to convey the undertaking, with all the estate, right, title, and interest of the company in and to the same.[2] This decision goes mainly upon the ground of defect of authority under the act.[3] Similar decisions were made at an early day, in regard to mortgages of canal and turnpike property, by trustees under act of parliament.[4]

2. But where these mortgages create successive liens, it has been held that ejectment will lie, and even a second or subsequent mortgagee of turnpike and canal tolls, including toll-houses, may maintain ejectment, and after the satisfaction of his own debt, hold for the benefit of those entitled.[5] So, too, when the mortgage is of an aliquot portion of the tolls and toll-houses, the trustees of the work, who receive sufficient tolls on the portion conveyed to meet the interest on the mortgage, are not liable to an action for money had and received; but only in equity, which would seem to be the

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

[2] Doe *dem.* Myatt *v.* St. Helen's & Runcorn Gap Railw., 2 Q. B. 364; s. c. 2 Railw. C. 756. But in the later case of Wickham *v.* New B. & Canada Railw., Law Rep. 1 Priv. Co. 64; s. c. 12 Jur. N. S. 34, before the Judicial Committee of the Privy Council, Lord *Chelmsford* said of the preceding case: "That case did not determine that the conveyance of an undertaking by a railway company would in no case carry the land. 'The word is ambiguous,' and may include the land or only the speculation."

[3] The acts under which these contracts were made were in these words: The directors for the borrowing of not exceeding £30,000, may "charge the *property of the said undertaking, and the rates, tolls, and other sums, arising and to arise by virtue of this act.*"

[4] Fairtitle *v.* Gilbert, 2 T. R. 169. But see Doe *d.* Banks *v.* Booth, 2 B. & P. 219.

[5] Doe *d.* Thompson *v.* Lediard, 4 B. & Ad. 137; Doe *d.* Watton *v.* Penfold, 3 Q. B. 757; Doe *d.* Levy *v.* Horne, ib.

And where a prior mortgagee, under a power of sale, disposes of the property, the purchaser takes the property relieved of all subsequent mortgages, and the only remedy remaining to such mortgagees is a resort to the surplus accumulated by the sale, if any, in the hands of the prior mortgagee. This point was decided in the House of Lords (1857), in Southeastern Railw. Co. *v.* Jorten, 6 Ho. Lds. 425; s. c. 31 Law Times, 44, reversing the decisions of the Vice-Chancellor and of the Court of Chancery Appeal.

only remedy of the mortgagee, unless by taking possession of the works, and receiving the tolls.[6]

*3. And under mortgages executed in conformity with the English acts, no action lies against the company upon the deed, to recover the money loaned or the interest, the acts of parliament only authorizing a mortgage of the tolls, &c., and not a personal covenant.[7]

4. But bond creditors may maintain covenant for the money loaned.[8] And where there is no restriction in the act of parliament, and the company, having the usual powers of a corporation, are allowed to borrow money, and to secure the payment of the same by an instrument which, upon the face of it, imports a covenant for payment, an action of covenant for the repayment of the money will lie against the company.[9]

5. But where a mortgagee or bond creditor goes into equity for relief, it seems to be the settled rule of that court that all standing in the same relation with the plaintiff must be made parties to the bill, either as defendants, or by bringing the bill on behalf of all such as may choose to come in and take part in the controversy, or avail themselves of the benefits of it.[10] In such case a receiver is

[6] Pardoe *v.* Price, 11 M. & W. 427; 13 M. & W. 267; 16 M. & W. 451. But a trustee under a trust deed from a railway company has no title to the income by force of such trust deed, unless he actually takes possession of and runs the road. Coe *v.* Beckwith, 31 Barb. 339.

[7] Pontet *v.* Basingstoke Canal Co., 3 Bing. N. C. 433; Furness *v.* Caterham Railw., 25 Beav. 614; s. c. 27 Beav. 358; Long *v.* Mathieson, 2 Giff. 71; Chambers *v.* Manchester & Milford Railw., 5 B. & S. 588; s. c. 10 Jur. N. S. 700. A railway company, with definite borrowing powers, can borrow in no other way than the one thus authorized. Chambers *v.* Manchester & Milford Railw., *supra*. But see Lowndes *v.* Garnett & Mosely Co., 33 L. J. Ch. 418.

[8] Price *v.* Great Western Railw., 16 M. & W. 244. See White *v.* Carmarthen, &c., Railw., 1 H. & M. 786.

[9] Hart *v.* The Eastern Union Railw., 7 Exch. 246; s. c. 8 Eng. L. & Eq. 544; s. c. in error, 8 Exch. 116; s. c. 14 Eng. L. & Eq. 535; Bolckow *v.* Herne Bay Pier Co., 1 El. & Bl. 74; s. c. 16 Eng. L. & Eq. 159; Perkins *v.* Pritchard, 3 Railw. C. 95; s. c. *nom.* Perkins *v.* Deptford Pier Co., 13 Sim. 277; Hill *v.* Manchester Water-Works, 2 B. & Ad. 544.

[10] Mellish *v.* Brooks, 3 Beav. 22; Hodges *v.* Croydon Canal Co., id. 86. These bonds and debentures, which stipulate for interest till a given time, when payment of the principal shall be made, bear interest till payment according to the English practice, where interest is not so universally allowed as in our courts. Price *v.* Great W. Railw. 16 M. & W. 244; 4 Railw. C. 707. A mortgagee, who takes possession of the works, is liable to be called to an account by any other mortgagee standing in the same degree of priority. Fripp *v.* Stratford

appointed, who is to pay out the * money received from tolls, &c., under the order of the court of chancery, according to equitable priorities.[11]

6. And after the appointment of a receiver by the court of chancery, and possession taken by him of the effects of the company, all other creditors whether of the same, or a superior, or inferior degree, are precluded from contesting their rights with the creditors, on whose behalf the receiver acts, by attachment, or levy upon the goods, such act being regarded as a contempt of the court of chancery, as long as their officer holds custody of the goods and

Railw. & Canal Co., 29 Law Times, 107; s. c. *nom.* Fripp *v.* Chard Railw., 11 Hare, 241; Crewe *v.* Edleston, 1 De G. & J. 93; s. c. 29 Law Times, 241. And see Baker *v.* Admr. of Backus, 32 Ill. 79.

[11] A proviso in a mortgage of the property and revenues of a railway company that all the rights of the bondholders or trustees should be subject to the possession, control, and management of the directors of the said company until default made, was held in Dunham *v.* Isett, 15 Iowa, 284, not to give the creditors of the company, under contracts made before default, but after the execution of the mortgage, a preference over the mortgage liens.

A bond or mortgage for securing money borrowed by a railway company, executed according to the statute form, is entitled to priority over an *elegit* sued out against the company by a judgment creditor. Long *v.* Mathieson, 2 Giff. 71; Furness *v.* Caterham Railw., 27 Beav. 358.

Where it was shown that a railway company, in violation of its duty, was applying and intended to continue to apply its revenues, the only means of paying its mortgage debts, to the satisfaction of junior incumbrancers, it was held in Maryland that the court would interfere, by injunction, and the appointment of a receiver, to the extent of its jurisdiction, at the complaint of the party aggrieved. State *v.* Northern Central Railw., 18 Md. 193.

A railway company having become insolvent and unable to pay its debts, certain of the bondholders and other creditors agreed that they would purchase the road, &c., at any sale that might be made thereof, and would organize a new company; that the new company should execute a new mortgage on the road to the amount secured by the first mortgage of the existing company, to secure bonds of the new company, the bonds under the old mortgage to be exchanged for the new ones. The plaintiff, a bondholder, signed the agreement, and received notice to deliver up his bonds, but failed to do so until after the purchase of the road and the formation of the new company. The agreement had been that they should surrender their old bonds, with all the coupons thereon, and receive in payment therefor the new bonds. *Held*, that the plaintiff, not having complied with the terms of the contract, had no right to claim any benefits under it, or to insist on the delivery of the new bonds. Carpenter *v.* Catlin, 44 Barb. 75.

The subject of the appointment of receivers is extensively discussed in Baker *v.* Admr. of Backus, 33 Ill. 79; *ante*, § 224 *b*.

effects of the company by an order from them.[12] *And that court will not entertain the question of priority of right in reply to the attachment for contempt. But if any other creditors claim priority, and wish to assert such priority of right to the effects of the company in the hands of the receiver, they must apply to the court of chancery for leave to do so, before that court.

7. So, too, the court of chancery refuses to entertain the question of the propriety of the appointment of the receiver, upon any collateral inquiry, and will do so only upon the motion to discharge the order.[13] And upon such motion the question of the priority of the execution creditor will be considered, and if maintained, he will, by order of the court of chancery, be allowed to levy, notwithstanding the appointment of the receiver, unless his debt be paid into court.[14]

8. Where the charter of a railway company, with banking powers, made the road a pledge for the redemption of the bills or notes of the company, it was held that this created a paramount lien upon only so much of the road as was constructed by the company; and that the portion constructed by the contractors, under a mortgage to secure them for the work done, was first liable to the contractor's lien, before the bill-holders could interpose any claim.[15]

9. But it seems to have been considered, in some of the American states, that railway companies, upon general principles, possessed the power to mortgage their effects in such a mode as to transfer the beneficial use of the franchise, for the benefit of creditors, and that a special permission in the charter, to mortgage for a particular purpose, did not abridge the general power.[16] *A

[12] In Ohio & Miss. Railw. *v.* Fitch, 20 Ind. 498, it was held that the mere appointment of a receiver, with the powers usually given to a receiver in chancery, does not relieve the company from liability to suit. The receiver operates the road subject to such liability. *Ante*, § 168.

[13] Russell *v.* The East Anglian Railw., 6 Railw. C. 501; s. c. 3 Mac. & G. 125; Fripp *v.* Chard Railw., 11 Hare, 241; s. c. 21 Eng. L. & Eq. 53.

[14] Russell *v.* East Anglian Railw., 3 Mac. & G. 125; s. c. 6 Railw. C. 501. The elaborate opinion of Lord Chancellor *Truro*, in this case, is of great importance upon this subject of the conflicting rights of creditors having different priorities, and which in this country will be likely to become one of vast consequence, as most of our railway mortgages are so executed as to create successive equities.

[15] Collins *v.* Central Bank, 1 Kelly, 435.

[16] Allen *v.* Montgomery Railw., 11 Alabama, 437. The same point is reaffirmed in Mobile and Cedar Point Railw. *v.* Talman, 15 Alabama, 472. In this last case it is said, in regard to the contract of mortgage, that neither the fact,

power to purchase lands, necessary and convenient for prosecuting their works, and to dispose of the same, implies a power to mortgage them to secure the debts of the company.[17] But *the mortgage

that it pledges the real and personal estate of the company without specification; nor that the amount to be secured is not stated; nor that it is made to secure future advances; nor that no time for redemption is fixed, can, *per se*, render it invalid. See Joy *v.* J. & M. Plank-Road Co., 11 Mich. 155; Coe *v.* Columbus, &c. Railw,, 10 Ohio, N. S. 372; Coe *v.* Knox County Bank, id. 412; Coe *v.* Peacock, 14 id. 187; Bardstown & Louisville Railw. *v.* Metcalfe, 4 Met. (Ky.) 199; Pennock *v.* Coe, 23 Howard (U.S.), 117. Limited companies formed under the English statutes, without special articles of association, may, by special resolution of the shareholders, passed with due formality, authorize the directors to borrow on the debentures of the company. Bryon *v.* Metropolitan Saloon Omnibus Co., 3 De G. & J. 123; s. c. 4 Jur. N. S. 1262. And directors of a shipping company with limited powers, having power, by the company's articles of association, to do all acts which the company might, except such as were specially required to be done by the company in general meeting, may borrow money for the purposes of the company on the security of its ships. Australian Auxiliary Steam Clipper Company *v.* Mounsay, 4 Kay & J. 733. See also Scott *v.* Colburn, 26 Beav. 276; Magdalena Steam Nav. Co. *in re*, 1 Johns. Eng. Ch. 690.

[17] Gordon *v.* Preston, 1 Watts, 385. So, too, a corporation, created to construct a railway, has the power to borrow money, as one of the implied means necessary and proper to carry into effect its specific powers. And this was held to be so, although the charter directs that the funds shall be raised by subscription. Union Bank *v.* Jacobs, 6 Humph. 515.

So, too, the legislature having given a railway company power to mortgage or pledge their property for the payment of loans, it was held that a deed executed under this power, assigning the company's road and all its effects, conveyed all the powers and franchises of the original corporation. Allen *v.* Montgomery Railw., 11 Alabama, 437; Pollard *v.* Maddox, 28 Alab. 321. In the former of these cases the court, in giving the opinion, said: "In our judgment the general powers of the corporation extended to the creation of a lien on all its property, without reference to the mode of creating the debt," and in the latter case the same is reaffirmed.

The power of a railway corporation to borrow money and mortgage their property, is not limited by the usual clause in their charter that shares shall not be assessed over $100, and if more money is necessary it shall be raised by creating new shares. An act of the legislature authorizing the trustees under a railway mortgage to sell the road, is a ratification of the mortgage so far as the state or public is concerned. A mortgage of a railway to secure bonds to be issued to raise money to pay the debts of the corporation, is not invalid as given to secure future advances. Richards *v.* Merrimack & Conn. River Railw., 44 N. H. 127. In Ohio, by the use of apt words, property to be hereafter acquired may be conveyed by mortgage. Coopers *v.* Wolf, 15 Ohio, N. S. 523. But the power to mortgage is limited to such property as the company could lawfully acquire. Taber *v.* Cincinnati, &c. Railw., 15 Ind. 459. A trust deed is in

must be executed, in conformity with the by-laws of the company, if any exist upon the subject, or it will be voidable on their part.[17]

10. It has been held that the power "to buy or sell real estate," and the general right to borrow money, on the part of a corporation, imply the power to mortgage its property, real and personal, to secure the payment.[18] A right of way may be mortgaged for the security of money borrowed, and in default of payment may be sold and transferred to the purchaser; and it will make no difference that the title is so acquired by another railway company, provided the original purpose and object of the grant be not thereby defeated or altered.[19]

11. And where the company receive the benefit of the money borrowed, they cannot avoid liability upon the mortgage given to secure its payment, by denying the authority of those who contracted the loan on their behalf.[20]

legal effect a mortgage. Coe *v.* Johnson, 18 Ind. 218; Coe *v.* McBrown, 22 Ind. 252; White Water Valley Canal Co. *v.* Vallette, 21 Howard (U. S.), 414. But in a late case in Maine a distinction was drawn between a trust deed, such as is provided for by the statutes of that state, and a mortgage; and it was held that the latter was neither within the letter nor the spirit of the provisions regarding the former. Bondholders of York and Cumberland Railw. *in re*, 50 Maine, 552. The power of a railway company to mortgage its property, and the rights acquired by the mortgagee, are extensively discussed in a late case in Kentucky. Bardstown and Louisville Railw. *v.* Metcalfe, 4 Metcalfe, 199. The court incline strongly to sustain the power of mortgaging with all its incidents; but the decision of the case turned mainly on the construction of statutes.

[18] By the court, in Susquehanna Bridge Co. *v.* General Ins. Co., 3 Md. 305. This is but an elementary principle in the law of corporations, and requires no labored citation of cases in its support. Lucas *v.* Pitney, 3 Dutcher, 221; White *v.* Carmarthen & Cardigan Railw., 1 H. & M. 786; s. c. 33 L. J. Ch. 93. But see *post*, pl. 12. And even where the directors of a company have no power to borrow, money lent the company and *bona fide* applied for its benefit, may be recovered of the company. Troup, *in re*, 29 Beav. 353; Hoare, *ex parte*, 30 Beav. 225. And see Taber *v.* Cincinnati, &c. Railw., 15 Ind. 459.

[19] Junction Railw. Co. *v.* Ruggles, 7 Ohio, N. S. 1.

[20] Ottawa Plank-Road Company *v.* Murray, 15 Illinois, 336. And a mortgage may be ratified by a subsequent board of directors. Hoyt *v.* Mining Company, 2 Halst. Ch. 253. But where the bonds of a railway company are pledged by the company as collateral security for their own indebtedness, smaller in amount than the par value of the bonds, and the pledgee still holds them, he is entitled to recover of the company no more than the amount secured by the pledge. Jessup *v.* City Bank, 14 Wisconsin, 331. See also Magdalena Steam Nav. Co. *in re*, 1 Johns. Eng. Ch. 690.

*12. But the deed of the shareholders will not convey the title of real estate, which belongs to the company.[21] And by parity of reason the deed, or mortgage of the property of the company, cannot transfer the corporate franchise, which is only made transferable by the general principles of the law of corporations, by the transfer of the shares. And this seems to be the most difficult question arising, in regard to those mortgages of railway companies, where their charter or the general laws of the state contain no special power enabling them to execute mortgages. The mortgage, as a mortgage of property, is valid, upon the general principles of the law of corporations. But as the corporate franchises reside in the shareholders, if the mortgagees foreclose, what title do they obtain, and how are they to make it available?[22]

[21] Wheelock *v.* Moulton, 15 Vt. 519; Bennington Iron Co. *v.* Isham, 19 Vt. 230.

[22] *Ante*, § 142. This is a subject of so much importance and difficulty, in this country at least, and so little has yet been decided in regard to it, that we would desire to speak with the utmost circumspection and reserve, and not to be understood as having formed entirely settled opinions ourselves in regard to it.

In Dunham *v.* Isett, 15 Iowa, 284, the query was raised whether the franchise of a railway company may be pledged by mortgage, but the point was not decided. See Commonwealth *v.* Smith, 10 Allen, 448. See also opinion in regard to mortgages on Troy & Greenfield Railway in Supplement.

In addition to what will come more properly under another head, *post*, §§ 239 *et seq.* we must acknowledge, that while it is obvious that the franchise of a business corporation, like a bank, or a railway, possessing important public functions and fiduciary responsibilities, cannot, at pleasure, be assigned without the consent of the legislature, it has not seemed equally obvious to us, that the *bona fide* mortgagees of the entire property, business, and franchises of such a corporation, by virtue of a deed executed without such consent, could not, by the aid of a court of equity, obtain such control over the franchise of the corporation, as to enable them to make the foreclosure of their mortgage available to them. If this cannot be done, it certainly argues a lameness in the powers of a court of equity, of which, in its former juridical history, there has not been found much reason to complain.

In coming to this conclusion we make no account of those cases where the grantees or assignees of a fishery, or other similar franchise, as in the case of ferries, Briggs *v.* Ferrell, 12 Iredell, 1; Bowman *v.* Wathen, 2 McLean, 376, have been allowed to dispose of them, without restraint, the same as of any other property. Watertown *v.* White, 13 Mass. 477; Felton *v.* Deall, 22 Vt. 170; Fay, Petitioner, 15 Pick. 243; McCauly *v.* Givens, 1 Dana, 261; Phillips, *et al.*, *v.* Town of Bloomington, 1 Greene (Iowa), 498. These are cases where there is no such extensive public trust growing out of the grant, and, by consequence, no implied obligation against a voluntary assignment. But the well-considered cases all concur in holding, that where this does exist, the franchise of corporate action is not

*13. In a recent case in New Hampshire,[23] by an act of the legislature, the Portsmouth and Concord Railway Company * were

alienable at will. Such is the fact in regard to the general duty of municipal corporations. So also where special trusts are conferred upon such corporations, like that "to authorize the drawing of lotteries under their own supervision, for the purpose of effecting certain improvements," it was held, that this trust cannot be so exercised as to discharge the corporation from its liability, either by granting the

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[23] Pierce *v.* Emery, 32 N. H. 484. In this case, before the execution of the mortgage, the company owned a cargo of railway iron, subject to the lien of the United States for duties, and agreed with the plaintiff that he might pay the duties; that the company should lay the iron on their track, and that if they did not pay the plaintiff the amount so paid by him for duties, within a specified time, he might take up the iron and hold it as security for the money advanced.

It was held, that the iron having thus passed into the possession of the company, the lien was gone, and could not be asserted by the plaintiff against the mortgagees, but that the contract was valid between the parties to it; and that if the trustees had notice of it, and assented to the existence of such a right in the plaintiff at the time they took their mortgage, the contract would be binding in equity against the mortgagors and their assignees, the future holders of the bonds.

And in another case decided at the same term, Haven *v.* Emery, 33 N. H. 66, it was held, that the rails having been laid upon a particular part of the road, with a view to preserve the lien, and this having been known to the mortgagees at the time they took their mortgage, the rails did not become the property of the company until the price was paid, that being the terms of the contract by which they were delivered to the company, and that the rights of the mortgagees to any benefit from the iron thus obtained, depended upon the payment of the price as much as those of the company. This is the case of a mortgage executed subsequent to the laying of the rails, and the notice to the trustees was held sufficient to bind the bondholders, as in the former case. See also Enders *v.* Board of Public Works, 1 Grattan, 364; Hunt *v.* Bay State Iron Co., 97 Mass. 279.

But the doctrine that the property of a railway company necessary to operate the road cannot be attached, does not apply where the attachment is to enforce a specific lien which accrued upon the acquisition of the property by the company without payment. Hill *v.* La Crosse, &c. Railw., 11 Wisc. 214; Corry *v.* Londonderry & Enniskillen Railw., 29 Beav. 263; s. c. 7 Jur. N. S. 508.

And in England judgment-creditors of a railway company will be postponed to the holders of debentures secured by a prior mortgage. Long *v.* Mathieson, 2 Giff, 71; Furness *v.* Caterham Railw., 27 Beav. 358. And the company will be restrained, at the instance of the mortgagees, from delivering legal possession of its lands and rails to a creditor who had constructed the railway, had obtained judgment against the company for his demand, and sued out an *elegit* upon it. Furness *v.* Caterham Railw., *supra*. And the same principle is maintained under the Canadian statutes. Herrick *v.* Vermont Central Railw., 7 U. C. L. J. 240. And see Aslet *v.* Farquharson, 10 W. R. 458.

authorized to issue bonds, and to execute a mortgage to trustees, to secure the payment of such bonds, "of the whole, or * a part, of

lottery, or selling the privilege to others, or in any other manner. Clark *v.* The Corporation of Washington, 12 Wheaton, 40. So, as we have before seen, in § 142, in regard to railways. And we cannot regard the fact, that the franchise of one corporation is allowed to be taken by another by virtue of the the right of eminent domain, as any argument for the voluntary alienation of the franchise.

But the case of the mortgage of the entire property of a railway, consisting chiefly of the road-bed and the superstructure and accessory erections, with the rolling stock, which is also in some sense an accessory, if not a fixture, for a *bona fide* debt, without which the works could not have been completed, presents certainly a strong ground for equitable interference, to the extent of the just powers of the courts of equity.

And while it is apparent (*ante*, note 21) that the power to convey the franchise resides in the shareholders, and in terms is not technically transferred by the deed of the company, unless special power has been conferred upon them for that purpose, still the mortgage of the entire property has so effectually transferred the beneficial use of the franchise, that it must either operate a dissolution of the company and a reversion of the road-way to the land-owners (Bingham *v.* Weiderwax, 1 Comst. 509; 2 Kent, Comm. 305, 307), or else the mortgagees be allowed to exercise the powers of the corporation, so far as its business functions are concerned; or what is equally at variance with the general law of business corporations, the entire mortgage must become practically inoperative.

The chief impediment in the way of carrying into effect railway mortgages, executed without express power from the legislature, is not that the corporation had not the power to execute such a contract, for, upon general principles, it is universally conceded that the contract, where there is no restriction upon the company, is valid and binding upon them. And it is settled in the English law that corporations, and especially railways and canals, may apply to the legislature for additional and enlarged powers, to enable them to carry into effect their proper functions, interests, and undertakings. *Ante*, §§ 142, 212.

We see no reason why this rule should not apply to railways in this country, since it is not an enlargement or qualification of the contract that is required, but power to render available a valid contract, already existing. And as there is no question the legislature might, in granting the charter or by a subsequent act, have given the power to execute valid mortgages, not only of their property, which exists on general principles of law, applicable to similar corporations, but of their corporate franchise also; so it must equally consist with the power of the legislature to ratify and confirm such a contract already existing, as it is not the consent of the corporators which is desired, so much as it is the assent of the sovereign to the transfer of public duties, conferred upon one person to another.

Hence there have been some decisions of the courts in this country confirming such mortgages executed without the consent of the legislature, on the ground of their recognition, or express ratification, by subsequent enactments of the

the real or personal estate of the corporation," and by the mortgage to give the trustees authority to sell "the real * and personal

legislature. Upon this ground was decided the case of Hall *et al.*, Trustees, &c. r. Sullivan Railw. (United States Circuit Court for the District of New Hampshire), before Mr. Justice *Curtis*, whose opinion may be desirable to the profession, and which is therefore inserted: —

"This is a bill in equity brought by certain citizens of the state of Massachusetts against the Sullivan Railroad Company, a corporation created by a law of the state of New Hampshire, and against George Olcott, a citizen of the last-mentioned state. It is founded on a mortgage, a copy of which is annexed to the bill, which purports to have been executed under the corporate seal, pursuant to certain votes of the corporation which are therein recited, and this mortgage conveys unto the complainants, as trustees, 'the railroad and franchise of the said company in the towns of Walpole, Charlestown, Claremont, and Cornish, in the county of Sullivan and state of New Hampshire, as the same is now legally established, constructed, or improved, or as the same may be at any time hereafter legally established, constructed, and improved, from its junction with the Cheshire Railroad Company to its junction with the Vermont Central Railroad Company, with all the lands, buildings, and fixtures of every kind thereto belonging, together with all the locomotive engines, passenger, freight, dirt, and hand cars, and all the other personal property of the said company, as the same now is in use by the said company, or as the same may be hereafter changed or surrendered by the said company,' *habendum* to the said trustees; and 'provided nevertheless, and the foregoing deed is made upon the following trusts and conditions.' Then follow the trusts and conditions, which will be more fully adverted to hereafter; but it should be here stated that the general purpose of the mortgage was to secure the payment of the interest and principal of certain bonds issued by the corporation, the interest whereon had become due before this bill was filed, and is unpaid. The bill prays: 1st. That the trustees may be put into possession of the railroad franchise and property conveyed by the deed, and may be directed by the court in its management and in the execution of their trust, and that the company may be restrained from intermeddling therewith. 2d. That an account may be taken of what is due to bondholders, and the company ordered to pay the same by a fixed day, and in default thereof that the company may be for ever debarred and foreclosed from all equity of redemption of the mortgaged property. 3d. That a receiver may be appointed for certain purposes, which it is not necessary here to specify. 4th. That a sale may be made of the franchise and property mortgaged. 5th. For relief generally; under which last prayer the complainant's counsel, at the hearing, asked for a foreclosure by sale, instead of a strict foreclosure as specifically prayed for, provided the court should be of opinion that a foreclosure by sale would be more equitable.

"The railroad corporation has demurred to the bill; and I will now state my opinion upon the several questions which have been argued, so far as they are necessarily raised by the demurrer.

"The first is, whether the mortgage is valid, and competent to convey what it purports to convey. The objection made by the respondents is, that the grant by the state of the franchise to be a corporation, and to build, own, and work a

estate, and all the rights, franchises, powers, and privileges named in the mortgage deed, or any part thereof," *and further provided,

railroad, and take tolls thereon, is attended with an obligation on the part of the company to exercise these franchises for the public benefit; that consequently the corporation cannot divest itself of its railroad and all the other necessary means of discharging its public duty; and as these franchises were confided to the particular political person, they can be exercised by that person alone, and any attempt to delegate them to others is inoperative and void, upon grounds of public policy. Many authorities have been cited in support of this position, the principal of which are, Winch *v.* The Railw. Co., 5 De G. & S. 562; s. c. 13 Eng. L. & Eq. 506; S. Y. R. Co. *v.* Great N. R. Co., 3 De G., M. & G. 576; s. c. 19 Eng. L. & Eq. 513; Beman *v.* Rafford, 1 Sim. N. S. 550; s. c. 6 Eng. L. & Eq. 106; The S. & B. R. Co. *v.* The L. & N. W. R. Co., 4 De G. M. & G. 115; s. c. 21 Eng. L. & Eq. 319; Troy & Rut. Railw. Co. *v.* Kerr, 17 Barb. S. C. R. 581; State *v.* Rives, 5 Iredell, 297.

"These authorities are sufficient to show that in England the law is as the defendants assert it to be in New Hampshire. To a certain extent it needs no authorities to show that the position might be well founded in New Hampshire. Among the franchises of the company is that of being a body politic, with rights of succession of members, and of acquiring, holding, and conveying property, and suing and being sued by a certain name. Such an artificial being only the law can create; and when created, it cannot transfer its own existence into another body; nor can it enable natural persons to act in its name, save as its agents, or as members of the corporation, acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is, therefore, not a subject of sale and transfer unless the law by some positive provision has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable. Peter *v.* Kendall, 6 B. & C. 703; Com. Dig. Grant, C.

"Whether, when they have been granted to a corporation created for the purpose of holding and using them, they may legally be mortgaged by such corporation, in order to obtain means to carry out the purpose of its existence, must depend upon the terms in which they are granted, or in the absence of any thing special in the grant itself, upon the intention of the legislature, to be deduced from the general purposes it had in view, the means it intended to have employed to execute those purposes, and the course of legislation on the same or similar subjects; or, as it is sometimes compendiously expressed, upon the public policy of the state. There is nothing in the particular terms of the grant of these franchises to the Sullivan Railway Corporation which expressly restrains their exercise to that corporation alone. The question, whether they can be exercised by any other person than the corporation, depending upon the public policy of the state of New Hampshire, to be deduced from an examination, not merely of this charter, but of the general course of legislation of the state on this and similar subjects, it is eminently proper that this court should, if possible,

that the deed of the trustees upon such sale, should convey to the purchasers "all the real and personal *estate, named in said mort-

follow, and not precede, the Supreme Court of New Hampshire in its conclusions respecting this question. In the absence of any decision by that court, I should enter on an examination of it with great reluctance. In the manuscript opinion of the Supreme Court of New Hampshire, in the case of Pierce *v.* Emery, which has been produced at the bar, Mr. Chief Justice *Perley* has stated some views on this question. If it were necessary for me in this case to come to any conclusion concerning it, I should probably assent to the views there expressed, though I do not understand the question whether a corporation can mortgage its railway and its franchise to own and manage and take toll on it came directly into decision in that case. But I do not find myself under the necessity of deciding this question, because I am of opinion that the legislature of the state of New Hampshire has so far recognized the validity of this mortgage, that it is not now to be deemed invalid as being contrary to the public policy of the state. On the 14th day of July, 1855, the legislature of New Hampshire passed an act, the title and first two sections of which are as follows."

[The two acts were here quoted in full. The first "for the purpose of enabling the company to pay its debts, and thereby to have greater power and means to provide for the public travel and transportation over its road," authorizing it to issue new stock to a certain amount, and the holders of bonds under the said mortgage, which is described by its date, to subscribe for the said new stock, and pay therefor with the said bonds under certain restrictions; and the second act, of the same date, exempting the trustees under the mortgage from personal liability, except such as they should assume by contract in case it should become necessary for them to take possession of the road, and to operate it for the benefit of the bondholders, and they should actually take possession of and operate the same. Peirce on Railways, in which this and the next opinion first appeared.]

"By the first of these acts the legislature recognized the existence of the mortgage now in question, and confer on the corporation new powers to enable it to pay the debts secured by the mortgage, and it is expressly declared that this was done to enable the corporation to have greater power and means to provide for the public travel and transportation over its railroad. By the second of these acts not only the existence of the mortgage and the power of the trustees to take possession of the railroad, and operate it for the benefit of the bondholders are recognized, but the responsibility to be incurred by the trustees in the exercise of these powers to take possession of and operate the road, is regulated and limited. After the legislature had thus granted to the corporation new powers to enable it the better to accomplish its duty to the public by paying off this mortgage, and have interposed to facilitate the exercise of the powers of the trustees under the mortgage by regulating and restricting the personal liabilities to be incurred by them in the exercise of these powers, it seems to be impossible to maintain that the mortgage itself is void, because contrary to the public policy of the state. The will of the legislature, while acting within the powers conferred by the people of the state, constitutes the public policy of the state, and, so far from manifesting its will to have this mortgage void and inoperative, it

gage-deed, together with all the rights, franchises, powers, and privileges in relation to the same," * which the corporation had, at

has interfered to help out its operation, and make it more easily available as a security. I do not think a court of justice can undertake to decide that a mortgage was contrary to the public policy of the state, after the legislature has directly interposed to aid the mortgagees to act under it. I am, therefore, of opinion that this mortgage, so far as it purports to convey to the trustees the tangible property of the company, and the rights to manage and work the road, and take toll thereon, is not void as being contrary to the public policy of the state.

"The next question I have considered is, whether the trustees are entitled, upon the case made by the bill, to a decree of foreclosure, either by a strict foreclosure, or by a sale. It is insisted by the defendants, that the only mode of foreclosing this mortgage is by a sale in pursuance of the fourth article; and though it is not denied that this power of sale may be executed under the direction of a court of equity, upon a bill framed for that purpose, yet it is objected that this bill does not show that a case exists for the exercise of that power; because it does not appear that the holders of two-thirds of the amount of the bonds have requested the trustees to sell. The right to foreclose is incident to all mortgages save Welsh mortgages; and there is no ground for maintaining that this is a Welsh mortgage, for the conveyance is a collateral security for the bonds of the company, the interest and principal of which are payable at fixed times, and the failure to pay such principal or interest is a breach of the second express condition in the deed. Balfe *v.* Lord, 2 D. & W. 480.

"Without undertaking to say that the parties may not restrict the right of foreclosure, I consider it quite clear that the insertion of a power of sale in a deed of mortgage neither deprives the mortgagee of his right to strict foreclosure where such right would otherwise exist, nor prevents a court of equity from foreclosing by a sale made under its direction, in cases where it finds a strict foreclosure is not matter of absolute right on the part of the mortgagee, and strict foreclosure would be inequitable. In Slade *v.* Rigg, 3 Hare, 35, Sir *James Wigram*, V. C., decreed a strict foreclosure, though the deed contained a power of sale, and it was argued that the execution of that power was the only remedy for the mortgagee. In Wayne *v.* Hanham, 9 Hare, 62; s. c. 4 Eng. L. & Eq. 147, the deed contained a power of sale. The mortgagee brought a bill for a strict foreclosure. The mortgagor resisted, and insisted that the mortgagee could only have a decree for a sale. Sir *George Turner*, V. C., reviewed the case of Slade *v.* Rigg, approved it, and decreed a strict foreclosure. These were mortgages of personalty, which increased the difficulty of ordering a strict foreclosure; but that, as well as the existence of the power of sale, was held to be insufficient to confine the mortgagee to an exercise of the power of sale contained in the deed. I think the true distinction is taken in Jenkins *v.* Row, 5 De G. & S. 107; s. c. 11 Eng. L & Eq. 297. It is between deeds containing a mere trust for a sale to secure money advanced, and a mortgage. The former must, of course, be executed as declared, and there the remedy stops. But if the deed be a mortgage, the right to a foreclosure arises from the nature of the security, and is entirely consistent with the existence of another right, namely, a power to sell *in pais*,

the time of the mortgage, and that the purchasers should thereby acquire "all the rights, * franchises, powers, and privileges, which

which the mortgagor cannot compel the mortgagee to execute. It is inserted for the benefit of the mortgagee, and he may avail himself of it or not, at his own will.

"It was argued in the case at bar, that it could not have been intended that a right to foreclose would exist, because, after foreclosure, the trustees would still hold as trustees, and so the whole matter would stand as before. It is true they would hold the absolute estate as trustees; but it would be as trustees for the bondholders, and subject to such disposition thereof as their rights and interests might require. In the case of Shaw *et al. v.* The N. C. Railw., 5 Gray, 162, the Supreme Court of Massachusetts had a similar mortgage before them, and held that the power of sale did not supersede the right to foreclose by bill in equity. My opinion is, therefore, that upon the case stated in this bill the trustees have a right to come into a court of equity to foreclose this mortgage. In what manner is it to be foreclosed, whether by a *strict foreclosure* or by a *sale*, it would be premature now to decide. Whether the statute law of New Hampshire, defining the rights and method of foreclosure, so affects the right itself that only a strict foreclosure, substantially such as is there provided for, can be decreed by a court of equity, or whether the grant of equity jurisdiction to the Supreme Court of that state can be considered as having affected the right of foreclosure by superadding those principles of equity respecting foreclosure which are administered in courts of equity; and how far this court is to regard either of these considerations, and what particular method of foreclosure the principles of equity require in this case, can only be properly decided at the hearing, when the merits of the case shall be before the court upon the allegations and proofs of both parties. For the purpose of this demurrer, it is enough that upon the case, as stated in the bill, the complainants appear to be entitled to some decree of foreclosure; and, inasmuch as the demurrer being taken to the whole bill must be overruled, if the bill for any purpose is sustainable, it is not necessary to decide whether the complainants are entitled to the aid of a court of equity to put them in possession, either in the course of, or independent of, a process of foreclosure. This question, also, may best be decided at the hearing. If the complainants merely sought possession of tangible property of the company, not for the purpose of foreclosing the mortgage, but to enable them to take its profits, there might be no sufficient reason for the interposition of a court of equity. On the other hand, if they also need to be quieted, and protected in the enjoyment of incorporeal rights, the nature of the rights, and their liability to numerous interruptions and infringements, might render the powers of a court of equity indispensable to their effectual protection. See Croton S. P. Co. *v.* Ryder, 1 Johns. Ch. 611; Newburg S. P. Co. *v.* Miller, 5 Johns. Ch. 111; Bos. W. P. Co. *v.* Bos. & W. Railw., 16 Pick. 525.

"When the whole case is before the court, it can be seen what the rights of the parties are, and how far and for what purposes the complainants need the aid of the court.

"The remaining question is, whether it was necessary for the trustees to make the bondholders parties. Generally, when a mortgage is made to a trustee

said corporation possessed, and the use of said railway, with all its property and *rights of property, for the same purposes, and to

for the benefit of a *cestui que trust*, I apprehend that the question whether the *cestui que trust* ought to be made a party, depends on the purpose of the trust. If the trustee is the proper party to receive and continue to hold the money for the benefit of the *cestui que trust*, so that the object of the suit is merely to reduce the trust fund to possession, that the trustee may hold it in trust, the *cestui que trust* is not a necessary party. For I take the general rule to be, that to a suit by a trustee to obtain possession of a trust fund, the *cestui que trust* need not be made a party. See Calvert on Parties, 212–215, and cases there cited; Allen *v.* Knight, 5 Hare, 272. But where a trustee is interposed between a lender and borrower, merely for the purpose of enabling the lender to obtain payment through the exercise by the trustee of powers conferred on him by the mortgage, and the lender is the proper party to receive the money, he should be made a party to a bill for foreclosure. It is in truth between him and the mortgagor that the account is to be taken, and he ought to be before the court for the purpose of taking the account, as well as to receive the money if paid. See Story, Eq. Pl. sect. 201.

"But this requirement of the presence of the *cestui que trust* must give way to the absolute impossibility, or even to the excessive inconvenience of complying with it; and the case at bar undoubtedly presents an instance of such excessive inconvenience, if not absolute impossibility. The bill shows that the number of different bonds secured by this mortgage was seven hundred and five, amounting to the sum of five hundred thousand dollars. They were not issued until after the execution of the mortgage. Of course their original holders are not parties to the deed. It is a notorious fact, and recognized in various ways by the legislation of most states where railroad corporations have issued such bonds, and manifestly contemplated by the deed in question, that these bonds were to be sold in the market, and pass from hand to hand. Consequently it must have been impossible for the trustees to know who were the holders when the bill was filed. And if then known, there would be no probability that they would continue in the same hands during any considerable time. To require the trustees to make the holders parties would amount to a prohibition to sue, and it is now too well settled to require a reference to authorities to show that courts of equity do not allow a rule respecting parties adopted for purposes of convenience and safety, to operate so as to defeat entirely the purposes of justice. Nor is this a case in which it could answer any beneficial purpose to make some of the bondholders parties in behalf of themselves and all others. The trustees are competent (Powell *v.* Wright, 7 Beav. 444), and it is their duty to represent all. The deed so treats them. In the cases of a sale, or possession taken of the road for the purposes of managing it, and receiving the income, the deed looks to the trustees to ascertain who are holders of bonds, and to pay to each his aliquot part, and it is in the power of the court, by directing the proper inquiries before a master, to have the holders of the bonds before the court at the moment when the account is to be taken, and thus afford all needful security, as well to them as to the mortgagors and the trustees. See Story's Eq. Pl. sect. 207 *a.*; Williams *v.* Gibbs, 17 How. 239; Gooding *v.* Oliver, id. 504. It was

the same extent, that said corporation could use the same, if said deed had not * been made, subject to the same liabilities as to the

stated at the bar, that the Supreme Court of Massachusetts came to this same conclusion in reference to parties in Shaw *v.* Norfolk County Railw. above referred to, but that no report of the decision on that point has been made. My opinion is that the objection for the want of parties is not tenable.

"The demurrer is overruled, and the defendants ordered to answer the bill."

The case of Shaw *et al.* Trustees *v.* Norfolk County Railw., 5 Gray, 162, is much to the same effect. The opinion of the court was delivered by *Merrick*, J.: —

"Several considerations have been urged upon our attention by the respondents, as valid objections to the maintenance of the present bill. It is insisted, in the first place, in their behalf, that a franchise created by the legislature and conferred by its authority on a particular party, cannot be sold or transferred by him to another. But if this general proposition, concerning which it is unnecessary at this time to express any opinion, should be admitted to be strictly correct, it would be of no advantage to the respondents in the present case, because their conveyance to the complainants has been ratified and confirmed by a subsequent statute, duly enacted. Stat. 1850, c. 175, § 2. Besides, by the deed of indenture recited in the bill, not only the franchise of the Norfolk County Railroad Company, but also all its real and personal property, consisting, besides other things, of lands, houses, stations, iron, sleepers, cars, and engines, was conveyed to the complainants, to be held by them in trust and as security for the payment of the bonds, which it was the purpose and intention of the corporation to issue and deliver to its creditors. And if any doubt could ever have been supposed to exist in relation to the transfer of the franchise, there certainly would have been none concerning the conveyance of the lands and personal property described in the deed of indenture. And there may be a suit as well for the foreclosure as for the redemption of lands subject to the encumbrance of a mortgage. Rev. Stat., c. 81, § 8.

"But the respondents further object that the bill cannot be maintained, because there was no such conveyance to the grantees as would in law give to them an estate absolutely upon a breach of the condition upon which it was made; and, consequently, that there was no equity of redemption in the grantors, and would be no necessity or occasion for any process to aid in effecting a foreclosure. This position is predicated upon the assumption either that the grantors are limited to the specific remedies provided for them in the deed or indenture, or that the legal effect of the deed is to create only, and nothing more than, a Welsh mortgage. But neither the one nor the other of these assumptions can be sustained. Welsh mortgages are frequently mentioned in the English books. They resemble, says Chancellor Kent, the *vivum vadium* of Lord Coke, under which the creditor took the estate, to hold and enjoy it without any limited time of redemption, and until he repaid himself whatever was due to him out of its rents and profits. But they are now entirely out of use in that country (4 Kent, Comm. 137), and they do not ever appear to have been recognized or practically known among the modes of conveyancing which have prevailed in this Common-

use of said railway, that said corporation would be under, if said deed *had not been made, and that the directors should have power,

wealth. They cannot exist under our statute, which provides that when the condition of any mortgage of real estate has been broken, the mortgagor and his assigns may redeem the same at any time before a legal foreclosure has been effected. Rev. Stat. 107, § 13.

"Every circumstance attending the transaction has the most manifest tendency to show that the deed of indenture executed by the respondents, and conveying their railroad, lands, and personal property to the complainants, was intended by them to be, as it in fact is, a mortgage of the granted premises. It begins with a vote of the stockholders, authorizing the directors to mortgage the railroad, franchises, and property of the company, to raise thereby such sums of money as should be found necessary to complete and equip the road, and pay off all existing liabilities. In the measures adopted by the directors, they recite and profess to be governed exclusively by the terms of that vote, and in pursuance of it, they authorize and direct the president and treasurer to execute a mortgage in the name and behalf of the company. And the instrument which was executed under that authority was afterwards ratified and confirmed by act of the legislature. Stat. 1850, c. 175. The deed of indenture contains in itself all the provisions, and has all the characteristics of that species of conveyance. It conveys an estate in fee to the grantees, to have and to hold the same to them and their survivors and successors, but upon the express condition that if payment of the bonds, and the interest accruing upon them shall be truly made as the same respectively fall due, the indenture itself shall thereupon become void, and of no effect. The conveyance being thus defeasible when the condition annexed to it has been performed according to its legal effect, and by means of such performance can be regarded in no other light than that of a mortgage of the estate conveyed. Erskine *v.* Townsend, 2 Mass. 493; Nugent *v.* Riley, 1 Metc. 117.

"And neither the right conferred upon the grantee to take possession, upon the non-performance by the grantors of the stipulated conditions, of the whole of the mortgaged property and to manage and control it, and apply the net proceeds arising from its use to the purposes of the trust, nor the duty imposed upon and assumed by them to proceed, and take possession of the premises upon the requisition of two-thirds of the bondholders, according to the special provisions relative to that subject contained in the deed, affects the nature and character or legal effect of the instrument itself. It was not less a mortgage than it would otherwise have been, because the grantees were invested by special agreement with an additional authority beyond what they would have possessed without it, and which they would have no right to exercise except under an express stipulation. And so long as they took no advantage and nothing has been done under it, the rights and interests of the respective parties to the conveyance, and their relations to each other, were in no respect changed or affected by it. 'A power to sell executed to one who relies upon such power, and expects and intends to purchase an absolute estate will, without doubt, pass an unconditional estate to the purchaser, though this form of conveyance is rare in this country.

notwithstanding the mortgage, to sell and dispose of any of the * personal property of said corporation, provided they should pur-

But while the power remains unexecuted, the relation of mortgagor and mortgagee subsists, if that was the relation created by the instrument separate from the power.' Eaton *v.* Whiting, 3 Pick. 484.

"But this bill may well be maintained by the complainants upon another and different ground. By the contract expressed in the deed of indenture, a trust is created, to the due performance of which they have firmly bound themselves and their successors. In the discharge of the duties thus created and thus assumed, the possession, management, and control of the estates and interests conveyed to them may — and as it seems to have already — become indispensable. For the due enforcement and regulation of such a trust, ample power is found in the jurisdiction of the court as a court of equity; and the present bill is an appropriate course of proceeding to procure for that purpose the intervention and exercise of its authority.

"The bill prays for general relief as well as for a specific decree in relation to the foreclosure of the equity of redemption. And upon the facts stated in it, and which upon the hearing were admitted to be true, we can see no reason why the complainants ought not to be put in immediate possession of the mortgaged property, in order that the purpose for which the conveyance was made may be accomplished, and the trust created by it be properly executed. The respondents have neglected, and still neglect, to pay the income, which has accrued upon a large proportion of the bonds which were duly issued, and which are held by the creditors of the corporation. These bondholders are entitled to demand the money which has become due, and it is the duty of the trustees to make use of the discretionary powers which are conferred upon them, for the express purpose of insuring the payments to which the creditors should severally become entitled. To that end, possession of the mortgaged property is indispensable, and the complainants ought therefore to have a decree by force of which they can obtain it.

"We see no ground for the suggestion that the bill cannot be maintained, because the complainants have an adequate and complete remedy at law. It is obviously quite the reverse. The nature of the property, with the possession of which they seek to be invested, renders it impossible for them to find a remedy in a single suit at law. There must be, if resistance is made to their claim of possession, unless recourse be had to the equitable jurisdiction of the court, actions real in different counties as well as actions personal, besides such other and further proceedings as may be suitable to obtain the control and enjoyment of the franchise of the corporation. And besides all this, the trust is to be regulated as well as the property possessed. To control all this property, to enforce these obligations, and to preserve the rights of all parties interested, the court can only, when exercising the equitable powers conferred upon it, afford a complete and adequate remedy.

"A decree properly prepared must therefore be entered on behalf of the complainants, entitling them to have immediate possession of all the mortgaged property." See also Chapin *v.* Vt. & Mass. Railw., 8 Gray, 575.

The case of Coe *v.* Columbus, P. & Ind. Railw. Co., 10 Ohio N. S. 372, is one

chase, with the proceeds thereof, other property to an equal *amount which should be held by the trustees under the mort-

where this subject is very extensively examined by the court, and where the decision follows in the same wake as those already cited. It was here decided that a railway corporation, under its general and ordinary corporate powers, could not alienate the franchise to be a corporation, or that for constructing and maintaining a railway, and receiving tolls for the transportation of passengers and freight, nor any interest in real estate held exclusively for the purpose of exercising its corporate franchises.

That after the road had been constructed and put in operation, its rolling stock is to be regarded as personal estate, subject to alienation and liable for its debts.

And where the corporation had the power to borrow money and to execute bonds for the same, and to pledge for the security of the same, by mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof, it was held: —

1. That for this purpose the company could not mortgage the franchise to be a corporation, as that appertained to the individual members of the corporation, but that they could mortgage the franchise to maintain the railway and to take tolls for its traffic in freight and passengers, and could also mortgage all its property, both real and personal, present and prospective, and the use of its franchise for the enjoyment of the same.

2. That the franchise of the company to condemn property for its uses by judicial procedure was not assignable by way of mortgage, beyond what was provided, either by the charter of the corporation or the general laws of the state.

3. That the execution of such mortgage by a railway company would not exempt its property from other liability, beyond what would result from the execution of a similar contract by a natural person.

The company having issued bonds, payable in ten years, with interest semi-annually, and negotiated them in the market at a discount, it was held, —

1. That it was a proper exercise of the discretion of the company to make the interest payable semiannually.

2. That a statute authorizing the company to negotiate their bonds, at such rates as they might think proper, extended to all the accessory securities.

3. That under this statute the company might exchange these bonds for iron for their road.

Where the company executed three successive mortgages, the first and last of which were in proper form, but the intervening one had not the requisite number of witnesses, but the third mortgage was expressly made subject to the two first, it was held that this preserved the priority of the lien created by the second mortgage over that of the third, without regard to its perfect regularity in form.

Where general creditors levied upon the personal property of the company acquired after date of all the mortgages, but the levy was made while this suit was pending, and the property in the hands of a receiver, it was held that such creditors could not proceed even as against the equitable claim of the second mortgage. And the fact that the claims of the attaching creditor were for

gage, in the same manner, as if the same had been owned by * the corporation, at the time of the execution of the mortgage, and specifically included therein."

money supplied the company for the payment of interest and taxes, and for the right of way on their line, gave him no superior equity.

Where the mortgages contained a power of sale upon prescribed conditions, and the action was brought by the trustee to whom the mortgage was executed for the benefit of the bondholders, to obtain relief under the power of sale, it was held, —

1. That the plaintiff was entitled to the relief asked.

2. That the real estate must be sold according to the general laws requiring it first to be appraised.

3. That the entire line of the road, with its fixtures, should be sold as one entire tract, extending into different counties, and the proceedings had in the county where the action was brought.

4. That the personal property must be sold as such, under such precautions to prevent a sacrifice as the court should direct.

5. That the court will treat the proceeding as a remedy for the debt, and will not include compensation to the trustee or to counsel.

6. That the trustees represent the bondholders, and they were not proper parties to the action. But any issue as to the amount due might be raised between the defendants and the trustees.

7. That the trustees represent the company in receiving the money, but the company might require that before the bonds were paid they should be surrendered, and, if paid in part, that they be produced and the proper indorsement made.

8. That any question which might occur in regard to any lost bond will be disposed of when it occurs, either by an independent proceeding, or by supplemental one.

9. That an order made requiring the bondholders to prove their claims, and state the amount paid for the bonds was erroneous.

And where the company had entered upon lands and constructed their road under an agreement with the owner that the land should be appraised by persons agreed, and that if the amount of the appraisal should not be paid by the company within sixty days after it was made, the land and all the fixtures should remain the property of the land-owner the same as if the company had entered upon and appropriated the same in their own wrong, the estimate having been made and not paid as provided, an injunction was prayed for against the company, to prevent their using the land, but the court declined to interfere, saying the party should be left to pursue the ordinary legal remedies.

A court of equity will not interfere to protect the property of a railway company against an attachment, at the suit of a mortgagee whose debt is not due, and who has by the terms of his mortgage no present right of possession against the company. Coe *v.* Knox County Bank, 10 Ohio N. S. 412.

See the following cases upon the general right of corporations to mortgage property. Jackson *v.* Brown, 5 Wendell, 590; De Ruyter *v.* St. Peter's Church,

*The directors made a mortgage to trustees appointed under the act, conveying "the railroad of said corporation, together * with all

2 Comst. 238; Gordon *v.* Preston, 1 Watts, 385; Bardstown & Lou. Railw. *v.* Metcalfe, 4 Metcalfe, 200.

Sutherland, J., in Jackson *v.* Brown, *supra*, says: "It would be very extraordinary if this or any other corporation had not the power to appropriate its property to the payment or security of its honest debts."

So, too, a release of tolls by a bridge company has been held valid. Central Bridge Co. *v.* Baily, 8 Cush. 319. So, also, the lease of a turnpike road was held valid in Jouitt *v.* Lewis, 4 Littell, 160; Enders *v.* Board of Public Works, 1 Grattan, 364.

And although the remedy in the case of railway mortgages must depend upon the form of the contracts very much, there seems no more difficulty in so restraining the corporation, by proper orders, in the court of equity, as to enable the mortgagee to obtain the benefit of his contract, when executed under the general powers of the corporation, than in appointing a receiver, to distribute the receipts of the company, under the order of the court, for any other purpose, which is every day's practice, in cases of indictment and conviction, and unsatisfied judgment for debts, and other liabilities, and in many other instances. And it must always be done in courts of equity, where they have an unsatisfied judgment or debt in that court against the company, and no other mode of enforcing it. And there is no special hardship in requiring the corporators to respect the rights of mortgagees which have arisen in the due course of business, and where the corporations have obtained funds thereby, through the instrumentality of agents of their creation, and by whose acts they should be bound to the extent of their corporate interests.

And even where an absolute foreclosure is allowed upon such a mortgage there seems no actual injustice to occur. But there is technically the superaddition of the title of the vital and exclusive franchises of the corporation, which was not included in the contract as originally executed, and could not be by the mere act of the corporation or its agents, without the intervention of the corporators or the legislature. It is true that under the incumbrance these franchises must prove but a barren form in the hand of the corporation. But as it is technically a right inherent in the corporators, we do not well comprehend how it is to be absolutely foreclosed in a proceeding upon a deed which confessedly does not include it.

It seems that it would be more in accordance with the general course of the English courts of equity, where the title to the franchise is not technically conveyed, to retain the case in that court for the purpose of enabling the mortgagees to obtain enlarged powers from the legislature, not inconsistent with the duties they owe the company under the deed, and which shall go exclusively to affect the remedy. Great Western Railw. *v.* Birmingham and Oxford Junction Railw., 2 Phill. 597; opinion of Chancellor, *ante*, § 142.

In the case of Goodman & Corwin *v.* Cincinnati & Chicago Railw., before the Superior Court of Cincinnati, not yet reported, the trustees of a mortgage of lands by the defendants brought their bill in equity, asking for a foreclosure and

its powers, rights, franchises, and privileges, with all the lands, buildings, and fixtures thereto belonging, or which may * hereafter

sale of the mortgaged premises, sufficient to satisfy the arrears of interest. The court *Storer*, J., held the plaintiffs entitled to the prayer of their bill, both by the terms of their mortgage and upon general principles of equity law, aside from any express provision in the deed. The learned judge based his opinion of the general right of courts of equity to order sale of the mortgaged premises, to meet the payment of any instalment of principal due (or any arrears of interest, which he regarded as the same thing) upon the following cases. King *v.* Longworth, 7 Ohio, 231; Stanhope *v.* Manners, 2 Eden, 197; West Branch Bank *v.* Chester, 11 Penn. St. 282.

As we have before said, some courts have held the franchise itself assignable upon general principles. *Ante*, vol., 1 § 1, p 4. Mr. Justice *McLean*, in Bowman *v.* Wathen, 2 McLean, 393, says: "In this respect" [the assignable quality of the franchise of a corporation] "no difference is perceived between a ferry franchise, the franchise of a toll-bridge, a turnpike, or railroad, or any other franchise of the same nature," the court at the same time holding the ferry franchise assignable, without the aid of a legislative act. And in Bardstown & Louisville Railw. *v.* Metcalfe, 4 Met. (Ky.) 200, the court, though admitting that the corporate existence or prerogative franchises cannot be mortgaged, hold that the right to build and use a railway is not a prerogative franchise, and that a purchaser under a railway mortgage may take and operate the road under the terms of its charter, and will be bound by the provisions of such charter. And the same doctrine is maintained in Bank of Middlebury *v.* Edgerton, 30 Vt. 182, per *Bennett*, J.

And in Grinnell *v.* Trustees of Sandusky, Mansfield, & Newark Railw., in the Court of Common Pleas in Ohio, it was held: —

"1. That a railroad company, authorized to borrow money for the construction of its road, has, as an incident to that power, and without an express grant in its charter, the power to secure such loan by a mortgage.

"2. That the mortgage of the road and its income is in effect a mortgage also of the franchises of the company, and upon a sale of the road under the mortgage the franchise will pass to the purchasers.

"3. That where two or more railroad companies become united and consolidated into one company under the statutes of Ohio, and such original companies had, prior to the consolidation, given mortgages on their respective roads, the rights and liens of the respective mortgages must be respected and preserved, due regard being had to the consolidation.

"4. That after such consolidation no one of the mortgages upon the original roads can be enforced by a separate sale of its original line, but all such original mortgages must be enforced by a sale of the consolidated roads, and the respective liens on the parts be adjusted in the distribution of the proceeds of the whole, upon the report of the master, so as to give each mortgage so much of the proceeds as may be estimated to arise from the part covered by its lien." Pierce on Railw. 512. And where the mortgagees make a sale of the road and its furniture and franchises, under a deed of foreclosure, and by arrangement with the directors of the company by which they escaped responsibility upon

thereto belong, with all the rights, franchises, powers, and privileges now belonging to, and held, or which may * hereafter belong

their indorsements for the company, and the price was below the real value of the property, the purchasers were decreed trustees for the creditors, suing, for the full value of the road, less the sum paid by them for the lien of others, which they had purchased at a discount. Drury *v.* Cross, 7 Wallace, U. S., not reported.

In Enfield Toll-Bridge *v.* Hart. & N. H. Railw., 17 Conn. 40, *Williams*, Ch. J., in giving judgment, says: "What are the rights of the plaintiffs? They are derived from the grant of the legislature, and are what in law is known as a franchise; and a franchise is an incorporeal hereditament, known as a species of property, as well as any estate in lands. It is property which may be bought and sold, which will descend to heirs, and may be devised. Its value is greater or less, according to the privileges granted to the proprietors." And this is but the repetition of the elementary definitions of a franchise, found in the earliest text-writers of the English common law. But in Pierce *v.* Emery, 32 N. H. 504, *Perley*, Ch. J., says, in regard to the rights of public railways: "They cannot convey away their franchise and corporate rights, nor perhaps the track and right of way, which they take and hold for the necessary use of their road." . . . "But they may contract debts, may purchase on credit, and we see nothing in the nature of their business, or in their relation to the public, which should prevent them from making a valid mortgage of their personal property, not affixed to the road, though used in the operation of it." The same view is maintained as to the right of the railway company to create a mortgage upon itself, so to speak, without the act of the legislature, in State *v.* Mexican Gulf Railw., 3 Rob. 513.

In Arthur *v.* Commercial & Railroad Bank, 9 Sm. & M. 394, it is held, that the franchise of a railway cannot be sold or assigned without the consent of the power which granted it. It is a mere easement, not the subject of sale. If the road be sold or assigned the franchise does not pass with it, nor is the corporation thereby dissolved, though it might be ground of forfeiture if insisted on by the State. State *v.* Comm. Bank of Manchester, 13 S. & M. 569. But an act of the legislature, authorizing the trustees under a railway mortgage to sell the railway, is a ratification of the mortgage, so far as the state or public is concerned. Richards *v.* Merrimack & Conn. River Railw., 44 N. H. 127.

In State *v.* Comm. Bank of Manchester, *supra*, there was a general assignment for the benefit of creditors, and for the completion of the road, of all the property of the plaintiffs, including their road. The court held such assignments valid, upon general principles, when made by railway companies, and that this was valid, except that it was indefinite in time, and to last until the debts were paid, when the fee of the road was to revert to the corporation, and that therefore the tendency of the assignment was to lock up the estate indefinitely; to create a perpetuity; to hinder and delay creditors; and to secure an ultimate and permanent advantage to the corporation; and was therefore void.

The charter authorized the company to hold the estate in lands, necessary for their road-bed and incidental uses, in fee-simple. And the court say: "If

to. or be held, by said corporation, and all the personal property of said corporation, as the same now is in use by said corporation, or as the same may hereafter be changed and renewed by said cor-

the estate be one in fee, we do not see why it is not the subject of assignment or sale on execution." And whether the estate in fee, or only the accruing profits, pass, by the assignment, the court did not decide, as either was sufficient to uphold the deed. And the court seem to entertain no question that the one or the other did pass by the assignment, but for the terms of the deed being against law, and on that account void.

It is also said, in this case, that whether or not a corporation, with a railway franchise attached to it, has power to convey away the railway and the franchises attached to it, is a matter between the state and the corporation, with which third persons have nothing to do. And it seems to us this suggestion is not without its force. It is certainly in analogy to other cases, where a corporation is guilty of abuse of its privileges, on the ground of which the state might enforce a forfeiture of its franchises. This is not a question which can be raised collaterally, or at the suit of one who has no direct interest in the question. The state may waive any such forfeiture, and until they do enforce it, the debtors of the corporation cannot insist upon it. See *post*, § 242. And much less should the corporation be allowed to shield itself behind the violated rights of the state, of which no complaint is made, and thus escape the legitimate effects of its own contracts. And see Richards *v.* Merrimack & Conn. River Railw., 44 N. H. 127; Chapin *v.* Vermont, &c. Railw., 8 Gray, 575.

Property purchased of a railway corporation at a mortgage sale is not liable to the debts of the original corporation. Vilas *v.* M. & Pr. du Chien Railw., 17 Wisconsin, 497. See Smith *v.* Ch. & N. W. Railw., 18 Wisc. 17.

In Commonwealth *v.* Smith, 10 Allen, 448, it was held that a corporation is not authorized at common law to mortgage its franchise without some further authority. But in Hendee *v.* Pinkerton, 14 Allen, 381, it was held that a railway corporation having authority to hold land for depots and storehouses, as well as for railway purposes, and to allow other railways to establish depots upon its premises, and sell or lease the land necessary therefor, but having no express authority to create mortgages upon its property, may lawfully mortgage lands held by it, and not required for railway purposes, to secure bonds issued by said corporation. And it was further held in this case, that if the same mortgage embrace some lands which the corporation had no authority to mortgage, with others to which that authority does extend, the mortgage may be upheld as to the latter only. And in Richardson *v.* Sibley, 11 Allen, 65, it was decided, that a street railway corporation has no power to mortgage its property, franchise, or road without legislative authority. Since the statute of 1854, ch. 286, railway corporations have no power in Massachusetts to issue bonds, except for the purposes and in the mode therein authorized; and all bonds issued otherwise are void, and a mortgage to secure them is also void. And where such bonds have been issued and secured by such an invalid mortgage, although the railway company itself does not seek to avoid the obligation, a holder of a second mortgage may take advantage of the defect. Ib. See also Atkinson *v.* Marietta & Cincinnati Railw., 15 Ohio N. S. 21.

poration." And the mortgage gave the trustees power to sell the road under the mortgage, in certain contingencies, and to execute a deed, that should pass to the purchasers, "all the property, real, personal, and mixed, rights, powers, franchises, and privileges of this corporation."

It was held, that although as a general rule nothing can be mortgaged, that does not at the time belong to the mortgagor:

That the statute in this case authorized the directors to make a mortgage, not only of the existing property of the road, but of the corporate rights and franchises, and of the railway itself, as an entire thing:

That the trustees under such a mortgage would hold subsequently acquired property as an incident to the franchise mortgaged, and as an accession to the subject of the mortgage:[24]

That the trustees under the mortgage in this case were entitled to hold personal property, acquired by the road after the * mortgage, against subsequent mortgagees of the specific property, so acquired.

It seems to be now (1869) well settled, that to the creation of a valid and effective railway mortgage the consent of the legislature is indispensable. But this may be obtained either before or after the creation of the mortgage, and may be by express enactment or by implication;[25] and is so much matter of course to be granted upon request, that it cannot be regarded as any serious impediment in the way of carrying into effect a single mortgage.

14. In the Court of Appeals in Kentucky, in the summer of 1856, it was decided, that when the statute of the state, where a loan was obtained, deprived the company of all defence, under the plea of usury, the creditors and subsequent mortgagees could not plead usury, in defence of the mortgage, given to secure the loan.[26]

[24] See to same point Coe *v.* McBrown 22 Ind. 252; Pennock *v.* Coe, 23 Howard (U. S.), 117.

[25] See Opinion in Commonwealth *v.* Troy & Greenfield Railw., in SUPPLEMENT and cases cited.

[26] First Mortgage Bondholders *v.* Maysville & Lexington Railw., 9 Am. Railway Times, No. 31. There really is no difficulty upon general principles in allowing the mortgage of a specific thing to carry along with it, or as incident, subsequent accessions, as the natural increase of animals, or the crops raised upon land. This is nothing more in principle than allowing the mortgagee to take the benefit of the growth of animals, or of crops, or the advance of market value. Smith *v.* Atkins, 18 Vt. 461. The rule of law, which forbids the

And in the same case it was held, that where the road *was built, and most of the property of the company was acquired, subsequent

sale or mortgage of property not *in esse*, is merely technical, and never had any existence in equity, or certainly never was generally maintained in that court. But in State *v.* Mexican Gulf Railw., 3 Rob. Louis. 513, it is held that a railway, where the soil upon which it is laid belongs to another, "the owners not having been expropriated," is not susceptible of being mortgaged, unless authorized by the legislature, and that future property can never be the subject of conventional mortgage.

But it has been held in Pennsylvania, that a mortgage by a corporation of their franchises, property, and effects, given after their entry upon lands, and before judgment for damages, will bind their equitable interest therein, subject to the payment of the judgment for the purchase-money; and that on a distribution of the sheriff's sale of the land, after the satisfaction of such judgment, the balance passed under a prior mortgage, in preference to one executed after the entry of the judgment and the consequent vesting of the legal title in the company. Borough of Easton's Appeal, 47 Penn. St. 255.

And in a recent case before the Supreme Court in New York, The Farmers' Loan and Trust Company *v.* Hendrickson, 25 Barb. 484, it was decided on argument and elaborate examination, that the rolling stock of a railway, such as cars, tenders, and locomotives, is accessory to the real estate, and passes by deed as a fixture or necessary incident; that railway mortgages, including the rolling stock, need not be filed as chattel mortgages; and that bondholders, under a mortgage not so filed, are entitled to the rolling stock, as against judgment creditors. *Strong*, J., said: "The property of a railway company consists mainly of the road-bed, the rails upon it, the depot erections and the rolling stock, and the franchise to hold and use them. The road-bed, the rails fastened to it, and the buildings at the depots are clearly real property. That the locomotives, and passenger, baggage, and freight cars are a part, and a necessary part, of the entire establishment, there can be no doubt. Are they so permanently and inseparably connected with the more substantial realty as to become constructively fixtures? Railways being a modern invention, and of a novel character, we have no decisions upon this question, and those relating to and governing old and familiar subjects do not absolutely control us, although we must necessarily resort to them as guides. Judge *Weston* well remarks, in Farrar *v.* Stackpole, 6 Greenl. 157, that modern times have been fruitful of inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightning-rods, which have now become common in this country and in Europe. Those might be removed from buildings without damage; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by a deed as appertaining thereto. The general principles of law must be applied to new kinds of property, as they spring into existence in the progress of society, according to their nature and incidents, and the common sense of the community. It may be that if an appeal should be made to the common sense of the com-

to the execution of the mortgage, although *such property could not be held at law, it might be in equity, and a foreclosure was accordingly allowed, in regard to the subsequently acquired property.

munity, it would be determined that the term 'fixtures' could not well be applied to such movable carriages as railway cars. But such cars move no more rapidly than do pigeons from a dove cote, or fish in a pond, both of which are annexed to the realty. Judge *Cowen* admits, in Walker *v.* Sherman, that a machine, movable in itself, may become a fixture, from being connected in its operations by boards, or in any other way, with the permanent machinery. It results from many cases that it is not absolutely necessary that things should be stationary in any one place or position, in order that they should be technically deemed fixtures. The movable quality of these cars has frequently, if not generally, induced the opinion that they are personal property. Hence, railway mortgages of rolling stock have, as I understand, been generally filed in the offices of the clerks of all the towns through which the roads pass. That was undoubtedly the more prudent course, as it saved any question as to the character of the property. Even the learned counsel for the plaintiffs has gone no further than to denominate the cars '*quasi*' fixtures. Public opinion, however, although respectable in matters of fact, is an unsafe guide as to legal distinctions.

"That railway cars are a necessary part of the entire establishment, without which it would be inoperative and valueless, there can of course be no doubt. Their wheels are fitted to the rails; they are constantly upon the rails, and except in cases of accidents, or when taken off for repairs, nowhere else; they are not moved off the land belonging to the company; they are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose; they are not like farming utensils, and possibly the machinery in factories and many of the movable appliances to stores and dwellings, the objects of general trade; they are permanently used on the particular road where they are employed, and are seldom, if ever, changed to any other. Many of these are strong characteristics of the realty; some of them have often been deemed conclusive. In Lushington *v.* Sewell, 1 Sim. 435, 480, Vice-Chancellor *Hart* was inclined to think the devise of a West India (real) estate passed the stock of slaves, cattle, and implements, because such things are essential to render the estate productive, and denuded of them it would rather be a burden than a benefit. The reason assigned appears to be sound; but the Vice-Chancellor carried the doctrine further than the cases would warrant, as slaves (in the West Indies), cattle, and implements of husbandry were objects of general commerce. In the case of The King *v.* The Inhabitants of St. Nicholas, Gloucester, 262, (cited by Judge *Cowen*, 20 Wendell, 269), it was decided that a steelyard, being in a machine-house, was a fixture. Lord Mansfield said: 'The principal purpose of a house is for weighing. The steelyard is the most valuable part of the house. The house, therefore, applied to this use, may be said to be built for the steelyard, and not the steelyard for the house.' Surely this reasoning is equally applicable to the cars on a railway. The railway is constructed expressly for the business to be done by the cars, and what evinces their essentiality in a strong point of view in this case is, that there can be no tolls, which

* And in the State of New York, where the legislature provided that railway corporations may, from time to time, borrow such

are expressly mortgaged, without them. It is remarked by Mr. Dane, in his Abridgment (vol. 3, p. 157), that certain articles were 'very properly a part of the real estate and inheritance, and pass with it, because not the mere fixing and fastening to it is alone to be regarded, but the use, nature, and intention.' Judge *Weston*, in the case which I have cited from 6 Greenleaf, in speaking of a saw-mill, said: 'If you exclude' (from the realty) 'such parts of the machinery as may be detached without injury to the other parts or to the building, you leave it mutilated and incomplete, and insufficient to perform its intended operations.' Surely all this would be true of a railway, for it is nothing without its locomotive vehicles. It is true that no mechanical or agricultural business can be carried on to much extent without tools or farming implements, and such tools and implements are universally conceded to be personal property; but then such tools or implements are not peculiarly adapted or confined to any particular establishment, but may be used upon them generally, and are subjects of frequent barter. It is different, I admit, as to the stationary machinery in a factory, and articles of a similar character in a dwelling-house, which are not absolutely fastened, but although they are considered as personal property for reasons peculiar to them, and not of universal application, yet such reasons do not seem to me sufficient, while many things become fixtures without physical annexation.

"If railway cars were used in any other place than upon the lands belonging to the company, or for any other purpose than in the execution of its business, or were constructed in such shape and so extensively as to become objects of general trade, or were not a necessary part of the entire establishment, I might consider myself as compelled by the weight of authority to decide, that, as they are not physically annexed to what is usually denominated real estate, they must be deemed personal property; but as each and all of these characteristics or incidents are wanting, the considerations which I have mentioned, or to which I have alluded, leading to an opposite conclusion, require us to determine that they are included as fixtures or necessary incidents in a conveyance of real estate. In thus deciding we shall unquestionably carry out the intention of the parties, as it could not have been the design of such parties — certainly not of the mortgagees — that the security should be diminished by the wear and tear of the machinery, and the inevitable accidents to which it is subjected. Possibly the substituted machinery might not be included in the mortgage, if it should be deemed personal property, and few, if any, would be willing to loan their money upon such an uncertainty, but it would be otherwise if the additions should be considered as made to the real estate." The same doctrine is maintained in Palmer *v.* Forbes, 23 Ill. 300; Hunt *v.* Bullock, id. 320; Pennock *v.* Coe, 23 Howard (U. S.), 117.

This opinion is certainly plausible, and it is impossible to say that the views here maintained will not, or may not, ultimately prevail. There is, no doubt, justice and convenience in such a view. But it seems to us somewhat of a departure from the general law of fixtures in this country, and at variance with generally received notions upon that subject, at present, when carried to the

sums of money as may be necessary for finishing their roads, or operating the same; and may issue bonds for the amount and mortgage their corporate property and franchises to secure the payment; and a railway company, in pursuance of the statute, * executed a mortgage of their road, constructed and to be constructed, together with all and singular the railways, rails, &c., rights and real estate now owned, or which shall hereafter be owned, by them; it was held to include all the property and rights of the company, and to be in conformity with the act.[26] And it was further held in this case, that the mortgage included a branch track, not projected or contemplated at the time of the original location, as an incident to the principal grant. But land held by the company for any other than legitimate railway purposes, will not pass by such mortgage.[26]

And where the directors of a railway company set apart the future earnings of the company in payment of interest on its bonds, secured by mortgage on its road and franchises, and to raise a sinking fund for the redemption of such bonds, it was held that such money was not liable to be reached by the general creditors of the company through garnishee process.[27] Nor would such earnings be liable to such process where they had been pledged for that purpose by the mortgage.[27]

extent of declaring the rolling stock of a railway a fixture. As between the mortgagor and mortgagee, and all subsequent encumbrancers having knowledge of the prior deed, there is no difficulty in allowing the rolling stock of a railway to constitute part of the mortgage of the road, and thus to include the renewals of such stock from time to time, and even additions. But it is not easy to comprehend how a locomotive engine and train of cars is any more a fixture than any other machine operated by steam, or than a stage-coach even. But see State *v.* Northern Railw., 18 Md. 193; Farmers' Loan, &c. Co. *v.* Commercial Bank, 11 Wisconsin, 207. See *post*, n. 31, 33. The contrary doctrine was held in Stevens *v.* Buffalo & N. Y. City Railw., 31 Barb. 590; S. P. Beardsley *v.* Ontario Bank, id. 619, where the rule of personalty was made to include locomotive engines and other rolling stock, — the materials, such as ties, rails, and other things on hand for repairing the railway, — platform scales, tools, and implements, and all articles not constituting a part of the road-bed, or firmly fixed to the land or some building, which is itself a fixture, — including such articles as are usually regarded as personal estate, but which may be affixed to some building by screws, but which may be removed from it without detriment either to the building or the article.

[26] Seymour *v.* Canandaigua & Niagara F. Railw., 25 Barb. 284; S. P. Phillips *v.* Winslow, 18 B. Mon. 431.

[27] G. & C. U. Railw. *v.* Menzies, 26 Ill. 121.

15. In an important case,[28] where the subject seems to have received a very patient and understanding consideration, by counsel, and by the Chancellor, it is held, that a mortgage of a canal, described by its extreme termini, with all the accompanying works, executed by virtue of a general power in a statute for that purpose, conveyed the entire canal, when completed, although a portion of it was constructed upon land acquired, after the execution of the mortgage, and was built after the date of the mortgage; and that the feeder of the canal passed by the mortgage, as part and parcel thereof.

But a mortgage by the company of all the property in any way belonging to or connected with the railway, enumerating cars, engines, &c., will not include canal boats purchased with the funds of the company, and run by it in connection with but beyond the limits of the road. And where it was attempted to * deny the title of such mortgagees to use such property by the consent of the company under such mortgage, on the ground of the illegality of the purchase of it by the company, the act being *ultra vires*, it was held that such question could not be raised by one deriving title from the company as against another party whose title originated from the same source. The title of the company is good against any one but the public, or until process of divesting it is sued against them in some mode.[29]

16. In a very recent case, before the Circuit Court of the United States, Mr. Justice *McLean* in the course of his opinion assumes, that railway mortgages may be so drawn as to bind the subsequently acquired property of the company; that the franchise of operating the road, and taking toll, or fare, and freight, passes by the mortgage, and may be sold under the mortgage, containing a special clause to that effect; that the power of sale contained in the mortgage does not preclude the trustee from coming into a court of equity, to obtain a foreclosure of the title of the mortgagor, and sale: that the suit is rightfully brought in the name of the trustees, without joining the bondholders: that the appointment of a receiver

[28] Willink *v.* Morris Canal & Banking Co., 3 Green's Ch. 377. It is here said, that the grant of the power to execute a mortgage implies a mortgage with all its incidents, including the power of sale.

[29] Parish *v.* Wheeler, 22 N. Y. 494. The company, in such case, are liable for money borrowed to pay for such property, and those to whom they sell or mortgage the property are liable to account to them. Ib.

in such cases is matter of discretion with the court of equity: that it is not matter of course, upon default of payment of interest; but must depend upon the question of the safe and prudent management of the property by the company, and the probability of the interest being speedily liquidated.

It was further said, that where an expenditure has been made of the current income of the road, and considerable debt incurred in completing the road and equipping it, under the advice of the trustee and a considerable number of the bondholders, such use of the funds will not be considered a misapplication. As it greatly increased the security of the bondholders, and added to the profit of the road, these facts, under the circumstances, do not authorize the appointment of a receiver.[30]

The case was retained, under an order that the company should make return to the court of the amount of their net earnings, one-half of which should be applied to the extinguishment of interest, and the other half to the floating debt of the company. But if at any time it shall appear that the company disregard the order, or is becoming insolvent, a receiver will at once be appointed.[31]

[30] And in Nichols *v.* Perry Patent Arm Company, 3 Stock. Ch. 126, it is laid down that the appointment of receivers is not a matter of course following upon a decree of the court declaring the corporation insolvent. It is a matter resting in the discretion of the Chancellor. But as a general rule, where there is a decree of insolvency, receivers will be appointed. The management of the affairs of the corporation will not be left in the hands of the directors, unless it be shown that it is for the interest of the creditors and stockholders that this should be done. Ib.

[31] Williamson, Trustee, *v.* New Albany & Salem Railw., U. S. Circuit Court, at Chambers, Cincinnati, October 26, 1857, Am. Railway Times, Vol. 9, No. 37. We here give the opinion, so far as the points of law are discussed by the learned judge: —

"The case made in the bill is the failure to pay the interest on the bonds in February last, and the embarrassed condition of the company.

"It seems to be considered that a receiver will be appointed, as a matter of course, under the mortgage, where a default has occurred in the payment of any part of the interest or principal. If this be so, the Chancellor, in such a case, can exercise no discretion. He can do nothing less than carry into effect the conditions of the bonds.

"It is not the province of chancery to enforce penalties, but to relieve against them. It is asked, may the court disregard the contract of the parties? Certainly not. But where there is a hard and unconscionable contract, a court of equity will withhold its aid, and leave the party to his remedy at law. An individual promises to pay on a certain day $1,000, and in default thereof to pay $2,000. Would not a court of chancery relieve from this penalty? And

* The case does not show whether the mortgage was executed by virtue of a power conferred by the legislature. But it is * believed

the payment of the penalty is the contract of the party. What penalty could be more disproportionate to the default than the one under consideration. A failure to pay any part of the instalment of interest subjects the company to the immediate payment of several millions of dollars, not payable except under the default, for many years; and the same default subjects property, to the amount of several millions, to a sale at auction on a short notice.

"The appointment of a receiver, when directed, is made for the benefit of all the parties interested, and not for the benefit of the plaintiff, or of one defendant only. 2 Story, Eq. § 829. The appointment of a receiver is a matter resting in the sound discretion of the court. Skipp *v.* Harwood, 2 Swanst. 586.

"In such cases courts of equity will pay a just respect to the legal and equitable rights and interests of the possessor of the fund, and will not withdraw it from him by the appointment of a receiver, unless the facts averred and established in proof show that there has been an abuse or a danger of abuse on his own part. For the rule of such courts is not to displace a *bona fide* possessor from any of the just rights attached to his title, unless there be some equitable ground for interference. Tyron *v.* Fairclough, 2 Stuart, 142; 2 Story's Eq. § 835.

"It is true that the parties in the contract under consideration agreed that a default in the payment of any part of the interest or principal, when payable and demanded, should incur the penalty sought to be enforced. Yet, when the aid of a court of equity is invoked, it will look into the facts, and exercise an equitable discretion. And if the party claims and attempts to exercise the powers given him in the contract, which under the circumstances are unjust and ruinous, he may be enjoined.

"Has there been any abuse of their powers or a misapplication of their funds by this company, which authorizes the appointment of a receiver?

"This step is asked to be taken by the bill, with the view of selling the entire road and all its appurtenances for the benefit of the bondholders.

"The interest due in February last has not been paid, and since that time another instalment of interest has become due, which has not been paid. All previously accruing instalments of interest were paid or satisfactorily arranged. And the late large outlay for the completion of the road and its equipment was not only approved by the complainant and many of the bondholders, but they urged the president of the company to go on with the work by all means, and finish and equip the road, so as to increase the revenue, and they agreed to receive bonds in payment of the interest then due.

"Under the influence of this encouragement it seems the company prosecuted the work and completed the road, which is now in successful operation. In this way, as appears from the affidavits, was every dollar of the floating debt complained of created. It went to increase the security of the bondholders by adding to the value of the road, and increasing the tolls for the payment of the interest and principal. But this is now insisted on as a misapplication of the funds of the road, which not only authorizes but requires the appointment of a receiver.

* 540, 541

the general statutes of Ohio allow such contracts, and the opinion certainly confirms the general views we have taken upon * the sub-

"But this does not, in my judgment, evince bad faith on the part of the company, but, on the contrary, it showed a laudable desire to save the bondholders, and all the parties interested, from loss.

"Had the road been in the hands of a receiver, no Chancellor, fit to deal with these subjects, it appears to me, could have hesitated to order the receiver to do, in this respect, what the company has done. In the deed of trust it is specially provided that the trustee, if he take possession of the road, shall make repairs, additions, &c., and an offer is now made to pay this floating debt, so far at least as laborers are concerned, if the road be given up by the company. Whether the debt be due to laborers on the road or to others, is not material, seeing it was incurred under the urgent request of the trustee and several of the bondholders, and for the preservation and life of the road.

"When property is purchased and placed upon the road, no lien being taken by the seller, it becomes subject to the mortgage lien on the road, so that it is not liable to an execution, except under the mortgage; and existing liens on the road under the mortgages can only be adjusted by a court of equity.

"But it is said the complainant and a part of the bondholders had no power to authorize the new expenditure in the completion of the road. Such an authority as was exercised will be respected and sustained by any Chancellor, at least so far as to relieve the company from any penalty or charge of misapplication of the funds of the road.

"By what authority does the complainant sue in this case, and claim a right to have equities adjusted between parties who claim conflicting interests? But in a matter of this kind, so essential to the interests of the bondholders, there can be no difficulty in sustaining the company, as above stated. But still the default is admitted, and the failure to pay occurred under the circumstances stated; and the question now is, whether this default requires the appointment of a receiver, and a discontinuance of the agency which now controls the road; and this is to be done preparatory to the sale of the entire property of the road.

"The bonds will not be due and payable for many years. They who made the loans looked to the interest and the ultimate payment of the principal.

"This procedure involves some fourteen or fifteen millions of property, the property of the railway and of the bondholders. Care should be taken in this case, as in all others, to administer equity, if possible, without a sacrifice of property.

"From the exhibits in this case there is a reasonable probability that, in the course of a short period, a vigorous operation of this road may enable its directors to pay the deferred interest and their floating debt; and the discharge of these will make the payment of the current interest on its bonds easy out of the net profits.

"If there were no other interests involved than that of the bondholders, such a course is so strongly recommended by equitable considerations, that no intelligent holder of such securities should object to it. The floating debt has accrued under circumstances which give a strong claim to the company for

ject, both as to the extent and the form of the remedy; and in both particulars it receives strong confirmation from the * elaborate and

some indulgence in the payment of the deferred interest, since the completion has added so much value to the security of the bondholders, and increased the profits of the road; and especially as the work was done on the recommendation of the complainant and a part of the bondholders.

"So far as the conduct of the company has been developed, in this somewhat informal examination, it is entitled to the highest commendation for its firmness, energy, and success in the accomplishment of this great work.

"There is a strong probability that in a very short time the road will be in a condition to meet its engagements under the mortgages, which is all the bond-creditors have a right to demand.

"No change of agency could increase, I am convinced, the efficiency of that already employed on the road. A sale of the property would in all probability sacrifice the stock of the road, amounting to between two and three millions of dollars, and more than half if not two-thirds of the property of the bondholders. It might enable some one or more persons to purchase the road at an almost nominal consideration. These consequences, I admit, are not to stand in the way of an equitable right, enforced under circumstances of fairness and justice. But if such results may be avoided by a short postponement of the interest, and under a prospect of a speedy payment, I hold myself authorized to do so under the facts above stated.

"But I will afford to the bondholders every reasonable assurance that can be required. I will admit an order to be entered that the motion of the complainant for the appointment of a receiver be denied, and that the said company, from and after the first day of January next, set aside one-half of the net earnings of the road, for the payment of the interest of the bonded debt of said company, — the other half to be applied to the payment of the floating debt of the company, — a report of the gross and net earnings to be made to the court monthly by the secretary of the company; that is, for the month of January, and at the close of the succeeding months, so soon as the returns can be received and made out, half of the net earnings to be paid into court for the bondholders. The company will report, also, in the court, how the net earnings have been expended from the 1st of November to the 1st of January aforesaid.

"But nothing in this order is to be understood as preventing the plaintiff from renewing his motion for a receiver, at any time prior or subsequent to said 1st of January, upon any new statement of facts which he may be able to present.

"The interest payable on demand. If the bringing of the action be considered a sufficient demand, the coupons must be presented and filed if payable to bearer, before payment will be ordered."

But see Taber *v.* Cincinnati, &c. Railw., 15 Ind. 459; Bank Commissioners *v.* Rhode Island Central Bank, 5 R. I. 12.

In the case of Ludlow *v.* Hurd, 1 Disney, 552, in the Superior Court of Cincinnati, the subject of the right of general creditors to levy upon the furniture and rolling stock of a railway, as against prior mortgagees, is very learnedly and sensibly discussed by *Storer*, J.

thorough opinion of Mr. Justice *Curtis*, which we have given in note (22) of this section.

In this case the deed was fully authorized by the general statutes of the state, and in terms included all the property owned by the company, at its date, "or thereafter to be acquired and owned by said company." The defendant having recovered judgment against the company, levied upon the furniture of their business offices in the city of Cincinnati. This was an application in equity for an injunction against defendant proceeding in the levy and sale of the property, on the ground that it being necessary for the enjoyment of the road, passed under the mortgage, although not in existence at the time of its execution.

The opinion of the learned judge is of so much interest to the profession, at this time, that they will require no apology for the insertion of an extract in regard to the state of that portion of the property of a railway, which, although not strictly a fixture, is an indispensable accessory to the available use of the road.

"Where a railway company is authorized by law to mortgage its whole corporate property, which includes not merely its road-bed, and the structures connected with it, but all its rights and franchises in addition, a conveyance by such terms must comprehend the power to reconstruct or repair the road by all the means necessary to accomplish the purpose. Whatever is added to the original structure becomes a part of it, and cannot be severed from it; and if the security by the mortgage is to continue to be of any value during the period that must transpire before the bonds become due, it must depend upon the implied covenant of the company to keep it in running order, and thus earn the necessary sums to discharge the accruing interest, and eventually indemnify the creditors for the principal debt.

"By the transfer to the plaintiff, we must hold, then, that a paramount right to all additions made to the railway subsequent to the date of the deed was vested; that the plaintiff could at any time, when interest was unpaid, take possession of the subject, which will include every species of property then owned by the company, as attached to, or incident to the road itself. If the right to the possession exists, then the right to protect the property from sale necessarily follows; and the plaintiff may ask us to aid him by injunction. The question in such a case is, 'Who has the better right, in equity, to call for the legal estate, or the legal possession?' and if the equitable owner of the incumbrance has done enough to perfect his equitable title, he has the better right. Langton *v.* Horton, 1 Hare, 560, 562; Newland *v.* Paynter, 4 Myl. & C. 408.

"The Supreme Court of New Hampshire, in Pierce *v.* Emery, 32 N. H. 484, have decided the direct question before us, though the case is somewhat involved. In New Jersey, Willink *v.* Morris Canal & Banking Co., 3 Green, Ch. 377, it was held that a transfer of the canal property carried with it all subsequent additions to the subject.

In the late case of Phillips *et al. v.* Winslow, 18 B. Mon. 431, the Court of Errors of Kentucky have adopted the same rule, and decreed a perpetual injunction against the intervening creditor, who had levied upon property acquired by the company subsequent to their mortgage; and a similar construction is given by Judge *McLean*, in the case of Coe, Trustee, *v.* Pennock and others, decided at the July term of the Circuit Court for this district, reported in the Am. Law Register for November, 1857, p. 27.

* In regard to the bill being brought in the name of the trustees, without joining the bondholders, there can be, we think, no just

"We have been referred to a clause in the deed of trust which authorizes the mortgagors to dispose of any part of the property that may not be necessary to the use of the road; and it is urged upon us, that this power thus reserved is inconsistent with the estate granted by the deed itself, and must, therefore, defeat it.

"It may, in many cases, be a very suspicious circumstance, when such a permission is given by the mortgagee; as, for instance, where a stock of goods, or articles of ordinary consumption, are pledged absolutely, and the title is consequently vested in the mortgagee; the liberty reserved to the mortgagor to sell, might well furnish, if unexplained, an implication of fraud in the contract; but where, from the nature of the property pledged, it is indispensable that many portions of it should, from time to time, be repaired, reconstructed, or renewed, there can be no impropriety in permitting the party who is bound to keep up the road, and provide all things necessary to its use, to dispose of the old material, either in part payment of new appliances, or for its general preservation.

"By this permission no one can be defrauded, and no rule of law is violated. The recording of the mortgage advises the public that the company have pledged their property, and it seems to us that the license to sell it, as limited in the deed, confers no greater right than the mortgagors would have had, if no such clause were inserted. A broken locomotive, a worn-out rail, the timber necessary to repair the road-bed, require to be protected from injury, and made available for the purposes of the pledge; hence, the mortgagor may well be the agent of the parties interested in the security to see that their property, however useless, is not totally lost, and a power to sell, if necessary to effect that object, might be inferred from the relation of the parties to each other.

"The question how far the property and franchise of a railway company, or any similar corporate body, may be subject to sale by execution, has been frequently discussed and determined of late years, both in England and the United States. It is settled, we suppose, definitely, that the franchise, which includes the right of toll, cannot be levied on and sold, unless the legislature, who granted it, assent to the transfer. This was decided in The State *v.* Rives, 5 Iredell, 267.

"It is the rule adopted by the Supreme Court of Pennsylvania in Ammant *v.* The New Alexandria & Pittsburg Turnpike Road, 13 Serg. & Rawle, 212; in Leedom *v.* Plymouth R. R. Co., 5 Watts & Serg. 266; and in Susquehanna Canal Co. *v.* Bonham, 9 id. 27; in Massachusetts, in Tippetts *v.* Walker, 4 Mass. 596; in Kentucky, in Winchester & Lexington Turnpike Company *v.* Vimont, 5 B. Monroe, 1.

"In Ohio, the point was fully examined and decided in Seymour *v.* Milf. & Chillicothe Turnpike Company, 10 Ohio, 476.

"The result is very clearly stated in the very accurate and learned treatise on the Law of Sheriffs and Coroners, by Mr. Gwynne, p. 341. 'The right of taking toll is a franchise, and is not, at common law, nor by the statute of Ohio, regulating judgment and executions, subject to levy on execution; it may be reached in chancery.'

* ground for any difference of opinion upon the proper application, of the most familiar principles of equity law.

"And the rule thus established is not confined to the franchise merely, it covers every case where it is attempted to separate the structure of a railway or turnpike road, in parts, by a seizure on execution. The whole work is regarded as an entire thing, and each portion so dependent upon every other, that the integrity of the fabric, from its commencement to its terminus, will be preserved.

"Thus it is said in 13 Serg. & Rawle, 212, already cited, 'The inconvenience would be excessive if the right of the company could be cut up into an indefinite number of small parts and vested in individuals.' Such a course would defeat the object of the incorporation, both as respects the stockholders and the public also, who have a very material interest in the preservation of every important thoroughfare, as they derive daily benefit from its use. We must regard, then, not among the least of the considerations which very properly press upon us, in examining a question like this, the public right and the public advantage. So long as a highway, similar to the present, can be kept up, it is required by the public interest that it should be. When, however, the corporate body becomes so involved in debt that it cannot longer fulfil the object for which it was created, a court of equity should interfere, take possession of the whole property, and wind up the concern. This is not only the course indicated in kindred cases, but it is peculiarly fit where creditors and debtors, with their varied interests in a common fund, are to be protected by an equal division of the assets, according to the priority of their liens.

"We have referred to this view of the case to illustrate more fully the rule we should adopt in examining the questions submitted by the pleadings.

"We cannot now determine whether the property levied on is essential to the business of the company upon the principles we have laid down. It may be that there have been extravagant expenditures in the furnishing of the apartments occupied as offices; it may be that economy has been ignored, and the fashion of the day, in the outlay of money, has been adopted; it may be that the old rule '*utere tuo ut alienum non lædas*,' has been forgotten; and it is our duty, if either the one or the other of these conditions exists, to see that the evil, for it is one, is corrected.

"No company has the right to permit its agents to pervert the corporate funds from their legitimate purpose, by providing unnecessary or costly offices, or office furniture, for their subordinates. Such an assumption is equally improper as would be the lavish expenditure of their income in the payment of salaries disproportionate to the labor performed, or distributing it among an army of *attachés* and dependants, who may be all the while consuming the substance of the corporation at the expense of those who have paid up their stock, or loaned money upon their bonds.

"There must be a reference to a master to examine the property levied on, and report immediately whether the same, on the principle indicated by the court, is necessary to the operation of the road; and if any part thereof can be disposed of without injury to the company, to describe it.

"Until the coming in of the report no further order will be made."

In regard to the right of foreclosure, that must depend upon * the provisions of the deed. But if it be technically a mortgage, it will entitle the mortgagees to foreclosure,[32] whether it contain a power of sale or not, that being but a cumulative remedy.

If it be what has been called a Welsh mortgage, or *vivum vadium*, or a provision for liquidating the debt out of the avails of the property, the more appropriate course will be the appointment of a receiver, or transferring the road into the power and control of the trustees, for the benefit of the bondholders, subject to accountability, before the courts of equity.

In another case[33] in the United States Circuit Court for the

[32] And the equity of redemption will also subsist for the protection of the mortgagor. And in a late case in Maine it was held, that where a railway company, owning a railway lying in two different states, under charters from each of those states, mortgage their whole road and franchise, and their right to redeem in one state, is sold on execution, the purchaser of the equity is entitled to redeem the whole road from the mortgage. Wood *v.* Goodwin, 49 Maine, 260.

[33] Coe, Trustee, *v.* Pennock & The Cleveland, Zanesville, & Cincinnati Railw., July Term, 1857, Am. Law Reg. Vol. 6, p. 27. We insert the opinion at length, as it comes from a judge of large experience and great practical good sense, upon a subject of vast importance to railway companies and to capitalists: —

"But it is not necessary to consider at large whether the mortgage in question, in regard to the equipments of the road acquired subsequent to the date of the mortgage, is operative at common law; as, if it cannot be so considered, there can be no doubt it is good in equity, and the question comes before us on a bill in equity. It seems to be admitted, as it is not denied, that the future profits of the road are subject to the mortgage. And what difference in principle can there be in the future profits and the necessary expenditure to produce such profits? Repairs, when necessary, of the rolling stock on the road, are not more within the mortgage than the purchase of the necessary supplies of such stock, as the public accommodation shall require. The mortgage was on a railway in full operation, embracing every necessary equipment and accommodation to give to it the utmost efficiency. This entered into the consideration of the parties to the mortgage, and any thing short of this would, in a great degree, impair the security of that instrument.

"Suppose a sheriff or constable had levied upon one or more of the passenger cars or of the locomotives within a few days after the machinery on the road was in motion; can any one suppose that the mortgage could have been defeated or its security impaired by such a step? Will it not be said that in such a case the stock would be within the protection of the mortgage? This no one could doubt, as a withdrawal of the stock from the road would not only impair the obligations of the mortgage, but defeat its object. In this respect, a railway in operation must be considered as protected in the capacity in which it was mortgaged; and

* northern district of Ohio, before the same learned judge, the following points were decided, wherein the same questions to some extent are further illustrated.

this is so manifest that the public, and especially subsequent creditors, are bound to know it. But the protection by the mortgage of the equipments upon the road, in the case supposed, are not more indispensable than to keep them in repair, replace them when destroyed, or add to them when required by the public exigencies; these are all within the purview of the mortgage, the contemplation of the parties, and known to the public.

"Does this view impose any hardship on the manufacturer of a part of the equipments subsequent to the date of the mortgage? Certainly it does not. He has a right to retain the possession of his work until it is paid for or the payment secured. Having delivered possession to the company in the ordinary course of business, without receiving the payment, he can assert no lien upon it either in law or equity; he stands in relation to the company on a footing with other creditors who have no security for their debts.

"In Mitchell *v.* Winslow *et al.*, 2 Story, 639, Mr. Justice Story says, 'Courts of equity give effect to assignments, not only of choses in action, but of contingent interests, expectancies, and also of things which have no actual or potential existence, but rest in mere possibility only.' In respect to the latter, it is true, the assignment can have no positive operation to transfer, *in præsenti*, property in things not *in esse;* but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come *in esse;* and it may be enforced as such a contract *in rem*, in equity. The same doctrine is laid down by Lord Hardwicke. Also, it was so held in Hobson *v.* Travor, 2 P. Williams, 191; Carleton *v.* Laightor, 3 Meriv. 667; 5 M. & Selw. 228; Curtis *v.* Auber, 1 Jacob & Walker, 512, 526; 1 Mylne & Keen, 488; Langton *v.* Horton, 1 Hare, 549; Mitford *v.* Mitford, 9 Ves. 100. In his Equity Jurisprudence, § 1231, Mr. Justice Story says, 'In equity there is a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers and have notice. For it is a general principle in equity, that, as against the party himself and any claiming under him voluntarily or with notice, such an agreement raises a trust.'

"The mortgage having been placed upon record in the three counties through which the road was to be constructed, and was in fact constructed, I suppose it must operate as a notice of its contents. See Hawthorn *v.* Newcastle and North Shields Railway Company, reported in Cross on Liens, Appendix, 408; Abbot *v.* Goodwin, 20 Maine, 408; 2 Appl. & Shep. 408; Macomber *v.* Parker, 14 Pick. 175.

"The third ground assumed is, 'that the trust deed is void for uncertainty as to the nature and extent of the grant.'

"The instrument has been attentively read and considered, and no uncertainty is perceived in its conditions, or as to the objects on which it is to operate. If its language were so vague as not to specify these matters with at least reasonable certainty, the mortgage could not be specifically enforced. But as this

* A mortgage given on the entire property of a railway, including future receipts for transportation, with an agreement that * property

objection does not seem to arise on the face of the instrument, and has not been shown in the brief of counsel, no further examination will be given to it.

"In the fourth ground, it is contended that the mortgage is void under the statute of frauds.

"As the trust deed was entered into under the enactments of the legislature, it certainly cannot be said to be against the policy of the law; and it is not perceived that any of its provisions conflict with the statute of frauds, seeing that they are authorized by law subsequent to that statute.

"In the fifth and last ground it is contended, 'the plaintiff does not show himself entitled to call upon this court to stay the hand of the judgment creditors.'

"The first mortgage to the complainant Coe was dated the 1st of April, 1852; the second to the same individual bears date in March, 1855.

"Prior to the execution of the second deed of trust to the complainant, a mortgage similar to the one first executed to the complainant was given to George Mygott by the same company, and on the same road, its equipments, &c., dated 1st of November, 1854, to secure the payment of bonds to the amount of seven hundred thousand dollars, which it was proposed to issue for the completion of the road, &c.

"It appears that the company employed P. F. Geisse to build for its use on the road a number of cars of different descriptions; and that in payment of the balance of his account, on the 20th November, 1854, he received sixteen of the second mortgage bonds, secured by the trust deed given to George Mygott. The judgment complained of was obtained on these bonds by Pennock and Hart.

"As the first mortgage of the complainant was executed the 1st of April, 1852, it is contended by the defendants' counsel that the first mortgage cannot avail him as to the two locomotives, the Hercules and Vulcan, and the passenger cars, 3, 4, 5, and 6, none of which were in existence until the fall of 1853, and the spring of 1854. And that before the execution of the complainant's second mortgage in March, 1855, this property had been conveyed to George Mygott by the trust deed dated November 1st, 1854, to secure sundry bonds, of which the sixteen on which the judgment was entered formed a part.

"This argument rests upon the hypothesis that as the two locomotives and passenger cars referred to were received by the company after the date of the first mortgage, and before the second mortgage was given to Mygott, and as the bonds on which the judgment was obtained were secured by the second mortgage, the complainant can claim no lien on this property under his first mortgage.

"The passenger cars and the locomotives referred to were in possession of the company and employed upon the road some months before the mortgage was executed to Mygott.

"It appears that Geisse, before he received the sixteen bonds, had taken from the company a draft for the amount due on New York or some other place, which was returned protested for non-payment. On the return of the draft the bonds were paid to him as the only means of payment within the power of the company. From this statement it is clear that the defendants Pennock and

on the road subsequently acquired shall be bound, and a conveyance of it be duly executed, gives an equitable lien on * property

Hart, as creditors of the company, stand upon no other ground and have no higher claim than any other holders of bonds issued under the second mortgage. Geisse, the builder of the cars, having delivered them to the company without taking a special lien, if he continued to be the holder of the bonds, would have no better claim than the defendants, who are his assignees. The bonds, it is presumed, are payable to bearer, and pass by delivery. Pennock and Hart are purchasers in the market, the same as other holders of bonds, covered by the second mortgage.

"A part of the gravel cars levied on by the sheriff were sold with the consent of the counsel in this case, and also of the complainant and the first bondholders; but the levy is understood still to include cars, &c., which belonged to the company when the first mortgage was given.

"In the first mortgage, for the consideration stated, the company covenanted to 'execute and deliver any further reasonable and necessary conveyance of the premises, or any part thereof to the party of the second part, his successors in said trust, and assigns, for more fully carrying into effect the objects hereof, particularly for the conveyance of any property acquired by said parties of the first part, subsequently to the date hereof, and comprehended in the description contained in the premises.' It is presumed the third mortgage deed to the complainant was executed in 1855 under this covenant. Entertaining the opinion that the first mortgage, by virtue of the above and other covenants which it contains, operated as an equitable mortgage on subsequently acquired equipments for the road, which was not displaced by the second mortgage, it is not deemed necessary to inquire what, if any, legal effect can be given to the last mortgage. Holley *v.* Brown, 14 Conn. 255.

"It is alleged in the bill that the entire property of the road will be inadequate to the payment of the first mortgage. The wisdom of the first bondholders was manifestly shown, by permitting the road to remain under its present management, being satisfied that the directors had discharged their duties faithfully and economically. This seems to be the only course that can retrieve the affairs of the company. In most cases, to place such a concern in the hands of a receiver involves it in hopeless ruin.

"Had Pennock and Hart, as holders of the sixteen bonds, a right to bring suit on them at law, and, having obtained a judgment, to sell on execution a part of the mortgaged property, without reference to the claims of other creditors under the same or other mortgages? Against such a procedure there are three insuperable objections: 1. A sale on execution would convey to the purchaser no exclusive right to the property sold. 2. Such a sale would not divest the equitable rights of other bondholders. The purchaser could receive only the same and no greater right than that which was vested in them by the bonds. 3. The claim must be prosecuted in equity, where all who have an interest in the subject-matter may be made parties. In equity only can the rights of all the parties be properly adjusted. And this is especially the case where the property mortgaged is inadequate to the payment of all the creditors. In addition to these considerations, from the nature of the property levied on, it could not be sepa-

subsequently acquired, to the holders of bonds secured by the mortgage.

rated from the road without suspending, in whole or in part, its operations. And what could be more unjust than this to the other bondholders? The operation of the machinery on the road, in the transportation of passengers and freight, constitutes its chief value.

"The railway, like a complicated machine, consists of a great number of parts, a combined action of which is essential to produce revenue. And as well might a creditor claim the right to levy on and abstract some essential part from Woodworth's planing machine, or any other combination of machinery, as to take from a railway its locomotives or its passenger cars. Such an abstraction would cause the operations to cease in both cases. As before remarked, the proper mode of enforcing payment against a railway company on bonds secured by mortgage, is to bring the creditors and the railway company into chancery, where the earnings of the road, through a faithful agency, may be distributed equitably among the creditors. And in a case where such a course would not satisfy the reasonable demands of creditors, to sell the road and distribute among them its proceeds. Such an extreme procedure, however, should not be authorized by any court, except under circumstances of absolute necessity. 13 Serg. & Rawle, 210; 9 Georgia; 9 Watts & Serg. 27.

"A stronger ground for an injunction than is taken in this case could not well be conceived. The defendants, under a judgment at law, have levied upon a large part of the rolling-stock on the road, which, if sold and removed, will stop its operations, while the same stock is under mortgage to creditors whose lien is prior to that of the defendants. Such a procedure, if carried out in this and other cases, would defeat the liens of creditors in such cases to many millions of dollars, and put an end to the structure if not the maintenance of railways.

"The court will perpetually enjoin the proceedings in the case at law, as prayed by the bill, at the costs of the defendants, Pennock and Hart." See the same case on appeal in the Supreme Court of the United States, 23 Howard (U. S.), 117.

In the case of Phillips *v.* Winslow Trustee, 18 B. Mon. 431, 445, it was held that the power to pledge the franchise of a railway company implies the power to pledge every thing necessary to the enjoyment of the franchise, and the conveyance of the road-bed with the superstructure and rolling-stock includes cars, wheels, firewood obtained for the use of the engines, and coal for the use of the machine-shop, as incidents.

In Dunham *v.* Earl (Sheriff), in the Circuit Court for the District of Michigan, it was held on motion for an injunction against the sale of the personal property of the company, at the suit of one of the mortgagees, that under a railway mortgage, (including the railway and its appurtenances), engines, cars, and all rolling-stock and personal property, which the company possessed at the date of the mortgage, as well as all after-acquired property, wood collected for the use of the engines, was held under the mortgage, and could not be taken by the sheriff upon the debts of the company.

The same views were also maintained in a case in Pennsylvania, in which it was further decided that where there is a question in the case whether

*A charter must be construed according to the intent of the legislature, if such intent can be ascertained, by the language used.

A person who constructs cars or other rolling-stock for a *railway, if he deliver the same to the company without any special provision therefor, can claim no lien upon it. He may effect this lien while this work is in his possession. And if he obtain a judgment against the company for the work, an execution cannot be levied on the rolling-stock on which a former lien exists.

Where there are liens on the property of a railway company, the liens must be adjusted in chancery, where each claimant shall receive his proportionate share of the proceeds. The appointment

the company had power to mortgage, the court, without deciding this point on a motion for a special injunction, will enjoin creditors and the sheriff from proceeding to sell property covered by the mortgage, but will also cause the lien of the *fi. fa.* to be continued till further order. Loudenschlager *v.* Benton, 3 Grant's Cas. 384.

In Ohio, it is held that a railway company may effectually mortgage its property, real or personal, connected with the use of its franchises, but hereafter to be acquired; but the existence of such mortgage does not operate to exempt such property, in its nature personal, and while in the possession of the corporation, from being levied upon by the judgment creditors of the company. Coe *v.* Peacock, 14 Ohio N. S. 187. And see Coe *v.* Columbus, &c. Railw., 10 id. 372; Coe *v.* Knox County Bank, id. 412. And in Massachusetts the right to mortgage, by apt words, subsequently acquired property, has been recognized. Howe *v.* Freeman, 14 Gray, 566. See also State *v.* Northern Railw., 18 Md. 193.

And see Coe *v.* McBrown, 22 Ind. 252; Farmers' Loan & Trust Co. *v.* Commercial Bank, 15 Wisc. 424.

But in State Treas. *v.* Somerville & Easton Railw., 4 Dutcher, 21, where a tax of one-half of one per cent was imposed annually upon the cost of the road, it was held that this did not include the equipments, cars, engines, and other personal property of the company. And in New York it has been held that rolling stock, rails, ties, platform scales, &c., and all articles not constituting a part of the road-bed, or firmly affixed to the land or to some building which is itself a fixture, including such articles as are usually denominated chattels, but which are annexed by a screw or the like to some building, and can be removed without detriment, not including a stationary engine and boiler, are not embraced in a mortgage of the railway, real estate, chattels real, and franchises of the company, but are subject to execution as personal property. Beardsley *v.* Ontario Bank, 31 Barb. 619. And unless a mortgage of the rolling-stock, &c., is filed as a chattel mortgage under the statute, a purchaser under a judgment sale, even though notified of the mortgage, takes the property in New York clear of such incumbrance. Stevens *v.* Buffalo, &c. Railw., 31 Barb. 590.

* 551, 552

of a receiver is generally ruinous, and a sale of such property should not be made under a reasonable prospect of payment, by a faithful application of the profits of the road.

17. It was held that a judgment creditor and debenture holder of a railway company, was neither entitled to a foreclosure or sale. The Master of the Rolls said: "There could be neither a sale nor foreclosure; but the plaintiff might possibly be entitled to be relieved from the burden of accounting as an encumbrancer in possession."—"That all he could do at present was to direct inquiries as to what was due the plaintiff, what charges there were on the railway and their priorities, and what, if any thing, was due the land-owners, and what lands were subject to their lien."[34]

18. Where a mortgage covering a railway and all apparatus was

[34] Furness *v.* Caterham Railw. Co., 25 Beav. 614, 619. But where one had levied under an *elegit* upon the lands of a railway company, the court directed inquiries; and if debt and costs were not paid within one month, that sale be made, under the direction of the court, of so much lands of the company as was necessary to satisfy the claim. *In re* Hull & Hornsea Railw., L. R. 2 Eq. Cas. 262. And after the appointment of a receiver of a railway, in a suit on behalf of debenture holders, a debenture holder recovered judgment, and petitioned for leave to issue execution. It was held he was not entitled to execution except as trustee for all the debenture holders entitled to be paid *pari passu* with himself, but an inquiry was directed whether it would be advantageous to the debenture holders for the receiver to take any proceedings to make the judgment available for them. Bowen *v.* Bacon Railw., L. R. 3 Eq. Cas. 541. Where a railway mortgage provides for compensation to the trustees for their services and expenditures that should be allowed, but will not embrace fees paid to counsel in suits between them and the mortgagors, or premiums for insurance procured by them without the request of the mortgagors. Boston & Worcester Railway *v.* Haven, 8 Allen, 359.

The trustee of a railway mortgage, where the road extends through two states, may be compelled by the courts of one of these states, having jurisdiction of his person, to sell whatever interest of the company passed under the mortgage. McElreth *v.* Pittsburg & Steubenville Railw., 55 Penn. St. 189.

A provision in a railway mortgage for the payment of the coupons and the debt, without any deduction, defalcation, or abatement of any thing for or in respect of any charges, taxes, or assessments whatever, does not oblige the company to pay the income tax thereon, due from the holder of the coupons under the United States revenue laws.

The courts of Vermont have decided that interest coupons attached to the mortgage notes of a railway company form part of the mortgage debt, and that when detached, a court of equity will enforce the payment of them by the company in connection with the mortgage. Sennot *v.* Brainerd, 38 Vt. 364; Miller *v.* Rut. & Wash. Railw., 40 id. 399. See also Wright *v.* Ohio & Miss. Railw., 1 Disney, 465.

executed, and three hundred of the bonds issued before the road was wholly graded, and when no more than one-fourth of the cost of construction had been expended, and while in that state the company, being unable to finish the construction, contracted with some third party to do it, under a contract to pay him partly in their bonds and partly in money, and with an agreement that he should retain the possession and use of the road and its fixtures, &c., until paid; it was decided, in equity, that the contractor acquired a lien prior to that of the mortgage to the extent of his expenditures.[35]

19. There is a recent case[36] of which it seems necessary to give a somewhat extended note. A railway corporation contracted with the plaintiff to build and equip their road, and gave him a conveyance of their interest and property therein, upon condition to pay all the bonds and coupons issued to him by vote of the directors, and in fulfilment of the contract for construction and equipment of their road, the deed to become void on full performance on their part, but otherwise in full force, the possession to remain in the grantors so long as they continued to perform their undertaking; but, upon failure in any respect for sixty days, the plaintiff was authorized to take possession of all the mortgaged estate, real or personal, rights of way or corporate franchises for the joint benefit of all the bondholders, whether due or not, who were declared entitled to share equally in the avails of the same on sale, at public vendue, on reasonable notice to the grantors, first deducting all costs and expenses incident to the possession and sale. The court held, —

That the instrument was not a deed of trust, but a mortgage.

That after a transfer by plaintiff of any of the bonds of the corporation, he held the legal title as mortgagee for his remaining interest, and in trust for the other bondholders.

That the contract was secured by the mortgage.

That the bonds have priority of payment from the proceeds of the mortgaged property over the contract.

That the conveyance contains no valid power of sale of the mortgaged property.

[35] Dunham *v.* Cin. Peoria & Ch. Railw., 13 Railw. T. 339. The transfer of the rolling-stock of a railway is valid against an execution creditor of the company. Blackmore *v.* Yates, Law Rep. 2 Exch. 225.

[36] Mason *v.* York & Cumberland Railw., 52 Me. 82.

That a sale by the mortgagee of all his right, title, and interest in the mortgage, and in a judgment recovered by him against the corporation for non-fulfilment of the contract, is an assignment of the mortgage, and the assignees hold the estate in the same manner as he held it.

That subsequent conveyances by the railway corporation cannot affect the rights acquired by virtue of the mortgage.

That the court will not determine what particular bonds are secured by the mortgage until the report of the master, to whom the case will be sent for that purpose.

That bonds not issued by the previous specific vote of the directors, but afterwards ratified and approved by the corporation, and received by M., and applied in accordance with the terms of the contract, are secured by the mortgage.

That the claim of an indorser of the company's notes, the proceeds of which were applied in part performance of the contract, is not secured by the mortgage.

That one bondholder may maintain a bill in equity to enforce payment of the bonds in his own name, but for the benefit of himself and all the other bondholders.

But that in such a case the court cannot properly examine and determine the rights of one claiming an interest in the judgment on the contract as equitable assignee, or as having an equitable claim upon it.

SECTION II*a*.

Mortgages and Debentures. — Receivers and Managers.

1. *Railway mortgages have, in this country, been held to entitle the mortgagee to foreclose and take the title and possession of the undertaking or works.*
2. *But in this case it was decided that, in England, nothing more passes to the mortgagee or debenture holder, than a prior right to payment out of the net earnings of the enterprise or undertaking.*
3. *Marginal notes of the decision.*
4. *Courts of equity not competent to take charge of the working of a railway, permanently.*
5. *This may be done, temporarily, in cases of insolvency or conflicting aims.*
6. *Suggestions, as to some permanent arrangements, upon the subject here.*
7. *Form of debenture, in England.*

8–11. *Opinion of Lord Justice* Cairns.

§ 235 *a*. 1. In the case of the debentures of the London, Chatham, and Dover Railway Company, the Lords Justices in the Court of Chancery Appeal, made a decision in the case of Gardner

v. that company,[1] defining the precise effect of English railway debentures, which have always hitherto been regarded as mortgages of the property of the company. The debentures in terms pledge "the undertaking" for the re-payment of the money borrowed. And that, in effect, is all that is done by any railway mortgage. It mortgages or pledges the undertaking for the repayment of the money. Now upon such a mortgage the question always fairly arises, what is to be regarded as the undertaking thus pledged or mortgaged? It has always been held in this country that this mortgage, when made with legislative authority, and it cannot otherwise be made to any effectual purpose, carries the right of absolutely foreclosing the title to the corporate property and the corporate franchises. In this view, there has always been a serious difficulty in such cases, unless in cases where the legislature provides, either by general or special law, for the creation of a new and distinct corporation, to carry forward the duties of such railway company.

2. But it is now held by the highest of the English courts of chancery that, by a mortgage of the undertaking, nothing more passes than a priority of right to the net earnings of the company; that the undertaking is the combined result of the corporate franchise and all the property rights, and the net avails of such combined property, which is but another name for the net earnings of the company. This decision places railway debentures and mortgages of the undertaking upon much, if not precisely, the same basis as that of preference stocks, which are very commonly issued in England, and not unfrequently in this country.

3. We insert, at length, for the information of the profession, the very able, and to us entirely unanswerable and satisfactory, opinion of the learned Lord Justice *Cairns*, found in 15 Weekly Rep. 325, for Feb. 2, 1867. The head-notes are as follows: —

"A mortgage deed given by a railway company in the form * given in schedule C of the Companies' Clauses Consolidation Act, 1845, 8 & 9 Victoria, ch. 16, does not give to the mortgagee any specific charge upon the surplus lands of the company, so as to entitle him to have a receiver appointed of the sale moneys and interim rents of those lands. The 'undertaking' pledged by such a mortgage is the going concern of the railway, the profits of which are the fund dedicated by the contract to the payment of the mortgage

[1] 2 Chancery App. 201.

* 705

debt. Surplus land is merely the representative of capital temporarily diverted from the execution of the works of the company, and invested in land, which land is to be resold, and the proceeds of such sale applied to the purposes of the company. The court will not appoint a manager of a railway. A railway company may give to their contractor a valid charge upon the proceeds of sale of surplus lands, in respect of works executed by him."

4. It will be seen by these notes that the decision covers another important point, that of courts of equity appointing a manager to conduct the business of a railway company, which has sometimes been done in this country. But we had always supposed the practice to be a very questionable one. For it amounts to nothing less than the court undertaking to execute the business of operating the road. To this there are very serious, not to say insuperable, objections. In the first place, the legislature has provided that this duty shall be performed by the company, and therefore the public as well as individuals have a right to insist that the company alone shall undertake such duty, and be held responsible in the ordinary mode for any failure in the performance of that duty. And notwithstanding the large confidence universally reposed in the courts of justice, and nowhere more than in the United States, nevertheless unless this confidence amounts to a belief in the absolute infallibility of the courts, and of all courts whether supreme or inferior, one would not desire to have his rights of redress limited to the decision of the particular tribunal into whose hands the management of the railway might happen to fall. For most of the American courts of equity, or those possessing equity powers, are not the highest judicial tribunals of the state. And there would be no right of appeal from the order * of the Court of Chancery directing the management of the railway, or the particular redress which might be awarded to one who might happen to suffer by its mismanagement, such orders being in their nature mere matters of discretion, and therefore not revisable in any other tribunal; whereas in cases of actions against railway companies for misconduct or mismanagement, the party injured is entitled to take the opinion of the court of last resort.

5. We know that in cases where a joint-stock company becomes insolvent, it is every day's practice for courts of equity to assume the control of the enterprise, and through the agency of a receiver to conduct for a time the business. This will also happen some-

times where two or more parties claim the net earnings of the company, either in succession or in conflict. But what is here decided is, that a court of equity cannot assume to take upon itself, through the instrumentality of its officers, to operate a railway permanently, or at least that it cannot do this without the authority of a legislative act.

6. We here insert a copy of one of these English debentures, drawn according to the English railway acts, by which it will appear that the contract in terms extends to all the "estate, right, title, and interest of the company in the undertaking," and that the mortgagee may hold the same until repaid his principal and interest, which is substantially all that can be implied from the American railway mortgages. We do not desire to be understood as having reached the confident conclusion that this view should be adopted in America. For it might be regarded as too great a change to bring about at once. It would drive numerous parties into the legislature, where very crude and unsatisfactory, if not impracticable, remedies would be likely to be provided. All we desire is that the public should wake up to the importance of having the entire subject of railway management brought under some uniform plan of legislative and judicial supervision, and, as is well known, we think it should be made matter of national concern. The following is a copy of the debentures: —

7. "London, Chatham, and Dover Railway Company (Under Various Powers Act of 1861).

"Mortgage Deed,

"No. 225. £600. Three years.

*"By virtue of the London, Chatham, and Dover Railway (Various Powers) Act, 1861.

"We, the London, Chatham, and Dover Railway Company, in consideration of £600 paid to us by Joseph Gardner, of Blaina, near Tredegar, Monmouthshire, Esquire, do assign unto the said Joseph Gardner, his executors, administrators, and assigns, the General Undertaking of the Company, as defined by that act. And all the tolls and sums of money arising upon or out of the said general undertaking by virtue of the several acts relating thereto, and all the estate, right, title, and interest of the Company in the same, to hold unto the said Joseph Gardner, his executors, administrators, and assigns, until the said sum of £600, together with interest upon the same, at the rate of £5 upon every £100 by the

year (subject to deduction in respect of property or income tax) be satisfied, the principal sum to be repaid at the end of three years from the first of July, 1863, and the interest to be payable half yearly, on the thirtieth of June and the thirty-first of December, at the bankers of the Company.

"Given under our common seal, this third day of December, in the year of our Lord, 1863.

"Registered, W. E. JOHNSON, Secretary."

8. *Cairns*, Lord Justice, said: "The orders now under appeal, so far as they appointed managers of the various undertakings of the London, Chatham, and Dover Railway Company, were discharged by us at the conclusion of the arguments in this case, because we were clearly of opinion that the orders were in this respect beyond the authority, and at variance with the practice of this court. When the court appoints a manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the officer or servant of the court, and upon any question arising as to the character and details of the management, it is the court that must direct and decide. The circumstance that in this case the persons appointed were the managers previously employed by the company, is immaterial. When appointed by the court, they are responsible to the court, and no orders of the company, or of the directors, can interfere with that responsibility. Now I apprehend that nothing is better settled than that this court does not assume the management of a business or undertaking, except with a view * to the winding up and sale of the business or undertaking. The management is an *interim* management; its necessity and its justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed that it may be sold as a going concern, and with the sale the management ends. To the management of the undertakings of the London, Chatham, and Dover Railway Company, assumed by the Vice-Chancellor's orders of the 12th and 17th of July, 1866, no limit, short of the repayment of the whole debenture debt, could be assigned; for it has not been and could not be contended that there would at the hearing of the cause be any power of selling the undertakings. But in addition to the general principle that the Court of Chancery will not in any case assume the permanent management of any business or undertaking, there is that peculiarity in the management of a railway which would, in my opinion, make it improper

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for the Court of Chancery to assume the management of it at all. When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers, and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and on no other body or person. These powers must be executed, and these duties discharged by the company. They cannot be delegated or transferred. The company will of course act by its servants, for a corporation cannot act otherwise, but the responsibility will be that of the company. The company could not by agreement hand over the management of the railway to the debenture holders.

9. "It is impossible to suppose that the Court of Chancery can make itself or its officers, without any parliamentary authority, the hand to execute these powers; and all the more impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management. It is said that the railway company did not object to the order for a manager. This may well be so. But in the view I take of the case, the order would be improper, even if made on the express agreement and request of the company. I may add that * the 53d and 54th sections of the Companies' Clauses Consolidation Act, 1845, contemplate, as the remedy of a mortgage debenture holder, for his interest and principal, either a suit at law or in equity to recover the amount, or the appointment of a receiver of 'tolls or sums liable to the payment of such principal and interest'; a remedy essentially different from the appointment of a manager of the undertaking; and, as regards authority for the appointment of such a manager, while no case has been cited in support of such an appointment, the cases[2] are, so far as they go, authorities against such an appointment. These, therefore, are the reasons why the orders of the Vice-Chancellor, of the 12th and 17th July, 1866, in so far as they appointed managers, are erroneous. The motions which we have now to dispose of are five in number." [His lordship stated the nature of the motions, and proceeded.] "I will postpone for the present any observation on the fifth motion; and as to the

[2] Pott *v* Warwickshire Canal Company, 1 Kay, 142, and De Winton *v.* Mayor of Brecon, 26 Beav. 533.

fourth motion, I will merely observe that no objection is made to a receiver of 'the Victoria Station Fund,' and an order for a receiver of that fund will be made in the usual manner. The main question, however, argued before us on the first four motions was, whether a receiver should be appointed of the rents and of the sale proceeds of surplus lands; or, in other words, whether the mortgage debentures of Gardner and Drawbridge affected those rents and proceeds in such a manner as to entitle them to a payment out of that specific fund through the medium of a receiver. In considering this question, it is necessary in the first place to look at the form of the debentures." [His lordship here stated the form of the debentures, and proceeded thus.] "We have next to ascertain the true character of surplus or superfluous lands held by a railway company. Surplus land may arise in one of two ways; it may be land originally taken by the company in the expectation and belief that it would be required for their line, or for the stations and works connected with it; or (and this is the origin of by far the greater quantity of surplus land) it may be land which the owner, under the provisions of the Lands' Clauses Consolidation Act, has forced the company to buy, in order that he may not have a severed part of a tenement or field left on his hands. * In either case the company is obliged to resell the land within a limited time, applying the proceeds to the purposes of their original act, on pain of the land revesting in the original owner, who, if the land be not in a town, is entitled to the first option of purchase. It is obvious from this that the surplus land is in truth the representative or equivalent of a certain proportion of the capital provided by the company for the execution of their works, which has, not for the purposes of profit, but for the protection of land-owners, been temporarily diverted, and invested in land to be again resold, and which is to return to the capital of the company when the purpose for which it is diverted has been accomplished. And as regards the *interim* rents, if any, of surplus lands, they would appear to be in the same position as the income arising from capital provided by the company and temporarily invested in any other manner until needed. The argument by which the debenture holders maintained their right to a receiver of the proceeds of the surplus lands was in substance this: They say they are mortgagees of the undertaking and of the tolls and sums of money

arising out of it, or by virtue of the act authorizing it; that all the land taken by the company under its parliamentary powers goes in the first instance to form a part of the undertaking; that as soon as any land becomes surplus land, it becomes at the same time subject to the parliamentary provision for its resale, but the sale-moneys are in turn subjected to this trust, that they are to be applied to the purposes of the special act, that is for the purposes of the undertaking; that these moneys, therefore, become and form a part of the undertaking, and therefore of their security, and ought to be preserved and applied for them by this court. It is necessary to observe carefully to what length this argument must go. A railway is made and maintained by means of its capital, by means of its borrowed money, of its land, of its proceeds of sale of surplus land, of its permanent way, of its rolling-stock. All of these may be said in a certain sense to be connected with, to be parts of, to make up the undertaking. If a mortgage of the undertaking carries *in specie* the sale-money of surplus lands, it must equally and on the same principle carry *in specie* the ordinary land of the company, the capital, the permanent way, the rolling-stock, — nay, even the very money itself, lent on the mortgage. The * assignment made by the mortgage debentures is immediate, and is to continue three years at the least. If the debenture holders are right in their argument, they become immediate assignees *in specie* of all the ingredients which I have enumerated as going to make up the undertaking; and they might from the first have asserted their rights as mortgagees by taking and impounding, not merely the proceeds of the surplus lands, but the capital, the cash balances, the rolling-stock, and even their own moneys advanced. Now it is beyond question that the great object which Parliament has in view, when it grants to a railway company its extraordinary and compulsory powers over private property, is to secure to the public the making and maintaining of a great and complete means of internal communication; and yet, according to the necessary consequences of the plaintiffs' argument, the moment the company borrowed money on debentures, it would depend on the will or caprice of the debenture holder whether the railway was made at all. I may further observe, that in any sense in which the sale moneys of surplus lands can be considered part of or arising from the undertaking, calls made and paid subsequent to the debentures must be equally a part of or moneys arising from

the undertaking. And yet the 38th section of the Companies' Clauses Act, 1845, and the form of the mortgage in the schedule, clearly assume that under the words of debentures, such as those now before us, future calls would not pass; and the 43d section provides that even when future calls are expressly included, the company may (unless the contrary is especially provided) receive the calls and apply them to the purposes of the company. The argument, again, of the debenture holders, goes in fact to claim for them the same position as if, under the term 'undertaking,' they were mortgagees of the whole property and effects of the company; and indeed the prayer of the bill of Gardner uses the words 'property belonging to or connected with the undertaking.' Now there is nothing in the Companies' Clauses Consolidation Act, 1845, to prevent the company borrowing both on land and on mortgage, and the 44th section provides that the bondholders 'shall be paid out of the tolls or other property or effects of the company,' words which in Russell *v.* East Anglian Railway,[3] were held to mean that the *bondholders might obtain a judgment, which, under the 36th section of that act would be levied on the property or effects of the company. But according to the plaintiffs' view, the whole of the property and effects of the company, being all parts of the undertaking, would be assigned and mortgaged by the debentures, and thus the remedy apparently given to the bondholders and judgment creditors of the company would be merely illusory.

10. "It is perhaps unnecessary to pursue further the consequence of the plaintiffs' argument. But it must be evident that if that argument be correct very great differences of opinion and of interest might arise among the debenture holders. Some might desire to arrest the continuance of the undertaking, and to obtain repayment out of the capital or other moneys advanced for the works, while others might consider that their most hopeful chance of repayment would be by the expenditure of these moneys, so as to earn tolls and profits, and it would be difficult in such a case to see any common interest among the body of debenture holders, such as to entitle one to maintain a suit in behalf of all. As regards the effect of the word 'undertaking' in these securities, we gain but little information from the definition given in the Acts of Parliament. In the two public acts, the Companies' Clauses and the

[3] 3 M & G. 104.

Lands' Clauses, the 'undertaking' is defined to be 'the undertaking or works by the special acts authorized to be executed'; and in the private acts the object seems to be not so much to describe what is included in the word 'undertaking,' as to define by metes and bounds the various undertakings of the company from each other. The object and design of Parliament in each of these various undertakings was clearly to create a railway which was to be made and maintained, by which tolls and profits were to be earned, which was to be worked and managed by a company, according to certain rules of responsibility, and under a certain responsibility. The whole of this, when in operation, is the work contemplated by the legislature; and it is to this that in my opinion the name of 'undertaking' is to be given. Money is provided for, and various ingredients go to make up the undertaking; but the term 'undertaking' is the proper style, not for the ingredients, but for the completed work; and it is from the completed work that any returns or earnings can arise. It is in this sense that, in my opinion, the * undertaking is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and parliamentary powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is by the contract dedicated to secure and to repay the debt. The living and going concern thus created by the legislature, must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and other sums of money *ejusdem generis*, — that is to say, the earnings of the undertaking, — must be made available to satisfy the mortgage; but in my opinion the mortgagees cannot, under their mortgage, or as mortgagees, by seizing or calling on this court to seize the capital or the lands, or the proceeds of sales of the lands, or the stock of the undertaking, either prevent its completion or reduce it into its original elements when it has been completed. I ought not to omit to notice a point much pressed by Mr. *Martineau* in his very clear and useful argument, namely, that inasmuch as by section 127 of the Lands' Clauses Act, the sale-moneys of surplus lands are to be applied to the purposes of the special act, and as the payment of over-due debentures

ought to be taken to be the first duty of a company, therefore that the debenture holders have a right to sustain a suit for the application of the sale-moneys to the payment of the debentures. There is no doubt that if the company were to use these sale-moneys in paying debentures, they would be acting in accordance with their powers; but even admitting that paying debentures is a purpose of the special act, there are many purposes, and the directors, and not the debenture holders, must in my opinion be judges to which of several purposes the moneys must be applied. Whether if a company, after mortgaging their undertaking, were to apply their capital or other moneys which ought to go into and improve the undertaking, to purposes wholly foreign to the undertaking, they could be controlled by the debenture holders, is a question which may at some time have to be considered, but which does not arise in the present *case. The observations which I have made show that, in my opinion no distinction should be made between the sale-moneys and the *interim* rents of the surplus lands. The order of the 20th November, directing the sale-moneys of surplus lands to be paid to the receiver, ought in my opinion to be discharged. As to the orders of the 12th and 17th of July, and the motion before us in the suit of Gardner, there ought, in my opinion, to be an order for a receiver of the tolls and sums of money arising from the undertakings mentioned in the two suits of Gardner and in the suit of Drawbridge, following the words of the securities. This would ordinarily be sufficient; but as the question of the sale-moneys of surplus lands has been raised and argued, I think that in each order it should be added: 'This order is not to extend to any rents or sale-moneys arising from surplus lands of the company.' The costs in these orders, both in the court below and before us, ought in my opinion to be costs in the respective causes. Although I have arrived at the conclusion which I have expressed without hesitation, I cannot avoid feeling regret that securities such as railway debentures, upon which so many millions of money have been invested, should have been left at their creation in a state to admit of so much argument as has taken place in this case, and that their legal operation and extent should come to be defined, not at the time when they were given as security, but after difficulties have arisen in their repayment.

11. "It only remains to consider the case of the Imperial Mercantile Credit Association. This company claim under Messrs.

Peto, Betts, and Crampton, and are transferees of their rights (whatever these may be), against the proceeds of certain surplus land of the London, Chatham, and Dover Railway Company, mentioned in their bill. The allegations are that a sum of £135,000 was due from the company to Peto and Co. as contractors for executing works, and that the directors of the company gave Peto and Co. a charge for this sum on the sale-moneys arising from these particular surplus lands. *Prima facie* evidence, and resolutions of the directors admitting the debt and making the charge are verified, and the company at the bar have admitted the claim, desiring, however, not to be taken as acknowledging the specific amount of the debt due to Peto and Co. It cannot, in my opinion, be doubted but that the company, owing their contractors a * sum for works done, might have paid that sum out of those surplus sale-moneys (the claim of debenture holders being out of the way); and if so, they might equally, as I think, have given the contractors a charge upon the sale-moneys for that amount. There ought, I think, to be an order in the suit of the Imperial Mercantile Credit Association for a receiver of these particular moneys; and as it is desirable to save the expense of a receiver's salary, some officer of the company may perhaps act without salary, or the purchasers may have liberty to pay their purchase-moneys into court directly. This order is of course merely interlocutory, and subject to reconsideration at the hearing; and if, as suggested at the bar, the dealings between the company and its contractors should be taken as requiring further investigation, there will no doubt be found fitting means of doing this before the cause is disposed of. The cost of this motion also, both before the Vice-Chancellor and here, ought, I think, to be costs in the cause."

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*SECTION III.

What Defences allowed the Company, in regard to borrowed Capital.

1. *Where the transaction is illegal no estoppel will preclude its defence.*
2. *Company may contract, beyond present powers, on future contingency of obtaining enlarged powers.*
3. *Company cannot allege their own fraud in defence.*
4. *Debentures issued without authority cannot be enforced by shareholders aware of the irregularity, nor even by their* bonâ fide *transferees.*
5. *But where the money has come to the use of the company, or the shareholders have recognized the debt, it must be repaid.*
6. *If the debenture holders are to be equally entitled, one cannot get advantage of the rest.*
7. *Debenture holders preferred to judgment creditors.*
8. *Transfer of debentures through forgery invalid.*

§ 236. 1. It is obvious that securities for capital borrowed, by railway and other companies of that description, with large capital, and intended in some sense to serve the purposes of safe investment, must be made strictly within the powers of the company and for the purposes of its creation. And where it is the purpose of those making the advance of capital to such company, as well as of the company, to perpetrate a direct violation of the charter, or any other specific illegality, to the detriment of the shareholders or the public, it will afford a sufficient defence to the company itself, upon the most familiar general principles applicable to the subject. And even an estoppel, by deed or of record, will not enable the creditor so to conclude the company, who stand in some sense in a fiduciary relation as *quasi* trustees for the shareholders and the public, as to escape the real question involved in the transaction.[1]

[1] Hill *v.* Proprietors of Manch. & Salford Water Works, 2 Barn. & Ad. 544. But unless some fraud is alleged to have been attempted to be perpetrated upon the shareholders, the estoppel will be enforced. See also Doe *v.* Ford, 3 Ad. & Ellis, 649.

But the mortgagor is estopped from setting up a prior mortgage to defeat the present action. Doe *v.* Penfold, and Doe *v.* Horne, 3 Q. B. 757. As to where time is of the essence of contracts, for the conversion of one security into others, see Campbell *v.* The London & Br. Railw., 5 Hare, 519. And the converse of this rule was applied in the case of Madison, &c. Plank-Road Company *v.* Watertown & Portland Plank-Road Co. Here the plaintiff corporation, which was created for the purpose of building a plank-road, guaranteed the payment of a loan of money made to the defendant corporation, for the purpose of enabling it to build its road, the completion of which would be advantageous to the

*2. Where the company agreed to sell shares to a party, on condition that as soon as they were paid in full they would give debentures in exchange for the shares, if they should then be in a condition legally to do so, the contract was held to be illegal, and a decree of specific performance was refused, on the ground that the company were not at the time authorized to raise money in that mode.[2] But where the trustees, under turnpike acts, having power to borrow money on mortgage of the tolls and toll-houses of the company, executed such a mortgage to their clerk, to whom they were indebted for costs, and recited in the deed that it was given for moneys advanced, it was held valid.[3]

*3. But the company cannot set up, in defence of a security

former; and on default of payment of this loan, such guarantor paid the amount thereof; and it was held that this guaranty being unauthorized, the payment created no liability on the part of the defendant corporation, for whose benefit it had been made. The guaranty and payment having been made by the plaintiff corporation, the defendant was held not to be estopped from setting up the want of power to make the contract of guaranty. Madison, &c. Plank-Road Co. *v.* Watertown & Portland Plank-Road Co., 7 Wisc. 59.

The Madisonville and Franklin Railway Company issued certain bonds, and made them payable to the order of the Madison and Indianapolis Railway Company, for the purpose of completing the road of the former company. The bonds were delivered to the Madison Company, and were indorsed and guaranteed by that company, and sent to its agent in New York for sale. The agent, in his circular offering them for sale, represented that they were owned by the Madison and Indianapolis Company. Suit being brought against the company upon its guaranty, it was held that it was within the scope of the corporate powers of the Madison and Indianapolis Railway to sell and guarantee bonds held by it in the regular course of its business; and that, as the contract of guaranty was upon its face such a contract as the company had power to make, the fact that the contract in this case was made for a purpose not authorized by its charter, as for the accommodation of another company, could not affect the right of a *bona fide* holder without notice to recover upon it. Madison & Ind. Railw. *v.* Norwich Savings Society, 24 Ind. 457. And see Conn. Mutual Life Ins. Co. *v.* C., C. & C. Railw., 41 Barb. 9, where the subject is discussed and views are maintained corresponding to those held by the Indiana Court. Olcott *v.* Tioga Railw., 40 Barb. 177. And where the secretary of a railway company offered bonds of the company to the plaintiff, who accepted and paid for them, and it proved, ultimately, that the company had no legal power to issue them, it was held the plaintiff could not, after the company had ceased to pay interest upon them, maintain a bill against the directors to compel them to pay him the amount, the bill not alleging either fraud or misrepresentation. Rashdall *v.* Ford, Law Rep. 2 Eq. Cas. 750.

[2] West Cornwall Railw. *v.* Mowatt, 17 Law J. (Chan.) 366.

[3] Doe *v.* Jones, 5 Exch. 16.

properly executed by them, that it was, through fraud between other parties and among themselves, not executed and delivered to the party really entitled to receive it.[4]

4. Debentures of a business corporation issued by the directors without due authority, although under the seal of the company, cannot be enforced by members of the company who accepted them after being present at the meeting where the irregular issue of such debentures was sanctioned. And a *bona fide* transferee of such debentures from such shareholders will stand in no better position. Nor can strangers or their assignees enforce them, where they were accepted by the first holders with knowledge that the condition on which they were issued had not been fulfilled.[5]

5. But where the money advanced on such irregular securities had been applied by the directors for the benefit of the company, and the shareholders have acquiesced in the transaction, the company and the shareholders are precluded from disputing their liability to repay the advance. And where a payment of six per cent interest had been made upon the debentures without objection, it was held that although the holders could not recover upon the debentures, they were entitled to six per cent interest on the advances.[6]

[4] Horton *v.* Westminster Improvement Comm'rs, 7 Exch. 780; s. c., 14 Eng. L. & Eq. 378.

[5] Magdalena Steam Nav. Co. *in re*, 1 Johns. Eng. Ch. 690; s. c. 6 Jur. (N. S.) 975.

[6] De Winton *v.* Mayor of Brecon, 26 Beav. 533; *post*, § 239. The question of the effect of an over-issue of debentures by the directors, and also the re-issue of the same, without the authority of a general meeting of the stockholders, as is required by the English statute in such cases, is considerably discussed by the present Lord Chancellor *Hatherley*, then Vice-Chancellor *Wood*, in Fountaine *v.* Carmarthen Railw., 5 Eq. Cas. 316. It was the rather reluctant and hesitating conclusion of his lordship, that the debentures, which were confessedly an over-issue, must be regarded as *ultra vires*, and so not binding upon the company; although there was not, as his lordship intimated there should have been, any declaration, on the face of the debenture, how much had been issued in all, and no ready mode of testing the fact by the purchaser, whether the debentures were, or not, in fact an over-issue. As to the re-issue of debentures, without the prescribed formality of the consent of a general meeting, his lordship adopted the somewhat new construction, that they being intended for the protection of the shareholders against the misconduct of their directors, was to be regarded as a matter wholly between those parties, and so merely directory, and not affecting the authority of the directors, so far as dealings with third parties were concerned. The most effective security to the shareholders must unquestionably be the holding the unauthorized acts of the directors inoperative, as to third persons even. But the rule seems to be otherwise in England. *Ante*, § 139.

6. These debenture holders, by the act of parliament, were to be entitled *pari passu*. One who had obtained an additional mortgage was held entitled to no advantage on that account.[6]

7. As between debenture holders and subsequent judgment creditors, the former are entitled to priority of lien upon money paid into court as the avails of the sale of the property of the company.[7]

8. Where railway debentures had been transferred by means of a forged indorsement of the names of two of the joint holders, by the third, who having the custody of them, made the transfer by deed, * the purchaser acting *bona fide* and paying full value, the transfer was set aside after the purchaser had been admitted on the books of the company, as the owner of the debentures, and the entry on the books of the company ordered to be cancelled.[8]

SECTION IV.

Right to issue preferred Stock. — Converting Loan into Capital.

1. *The company may issue new stock, and give it preference as a* bonâ fide *means of borrowing money.*
2. *By English statutes, loan may be converted into capital. Terms of statute must be strictly pursued. Courts of equity cannot dispense with them.*
3. *Debenture holder in England not entitled to foreclosure.*
4. *Right of company to issue stock certificates bearing interest. Such interest cannot be paid in the bonds of the company. Ratification of such issue.*
5. *Guaranteed stock cannot be enforced against the corporation except by the courts of the state where the corporation is chartered; nor by them, unless the corporation possess the means of payment according to the terms of the guaranty.*

§ 237. 1. The company, where the capital is not limited in the charter, may from time to time issue new shares, and probably give them a preference, as a mode of borrowing money, where they have the power to borrow on bond and mortgage, as preferred stock is only a form of mortgage.[1] But without the power to mortgage expressly given, the right of the majority to issue preferred

[7] Furness *v.* Caterham Railw., 27 Beav. 358.

[8] Cottam *v.* Eastern Counties Railw., 1 J. & H. 243; s. c. 6 Jur. (N. S.) 1367.

[1] Bates *v.* Androscoggin & Kennebec Railw., 49 Me. 491, where the question of the rights of holders of preferred stock is discussed very fully. There is nothing against law or public policy, say the court in Evansville, &c. Railw. *v.*

shares, a majority of which they would themselves be entitled to hold, might be more questionable.[2]

* 2. By the English statutes, loan may, on certain conditions, be converted into capital; but those interested must strictly pursue the terms prescribed for accomplishing such change, and time is regarded as of the essence of the right to claim such conversion.[3] And it is no sufficient reason to claim a dispensation at the hands of a court of equity, that one of the shareholders was out of the country, and had no notice of the vote of the company till after the time limited in the same for application to convert loan into shares had expired.[4]

3. It has been held that the holder of debentures under the English railway acts, which is a kind of mortgage bond, is not entitled to a foreclosure or a sale of the works of the company, or of

Evansville, in the agreement of a railway company to allow interest on stock subscribed; 15 Ind. 395.

[2] Where, under its articles of association, a company was empowered, at a special meeting, to increase the capital stock of the company by the issue of new shares, to be of such nominal value, and subject to such conditions in regard to the payment of calls and distribution of profits, as might be determined, it was held that this did not authorize the issue of preference shares. Moss *v.* Syers, 32 L. J. Ch. 711.

In Hutton *v.* Scarborough Cliff Hotel Company, 2 Drew. & Sm. 514, it was held, that the court will, at the suit of dissenting shareholders, restrain the issue of preference shares in accordance with a resolution passed at a general meeting of the company.

[3] Hodges, 160, 161, 162; Campbell *v.* London & Br. Railw., 5 Hare, 519.

[4] Parsons *v.* London & Croydon Railw., 14 Simons, 541. And where, by the terms of a railway bond a period was fixed within which it might be converted into stock at the option of the holder, it was held, that an agreement for the extension of the bond after the time appointed for payment did not extend also the right to conversion into stock. Muhlenburg *v.* Phila. & Reading Railw., 47 Penn. St. 16.

But where preferred stock was allowed to be issued, with a statute provision that the whole of the interest or dividend which would in each year have accrued, should be applied in or towards, in the first place, payment of interest or dividend at the rate of six per cent per annum upon the preferred stock and only the remainder, if any, should go to the holders of the other stock, it was held that the holders of the preferred stock were to receive six per cent in full upon their shares before any payment was made to the holders of other stock, and that all arrears due to the preferred shareholders must be made up before the others could receive any dividends. Matthews *v.* Great Northern Railw., 5 Jur. N. S. 284; Corry *v.* Londonderry & Enniskillen Railw., 29 Beav. 263; s. c. 7 Jur. N. S. 508.

the thing pledged, for the repayment of the money; but inquiries were directed.[5]

4. It seems questionable how far railway corporations without special authority of the legislature have power to issue stock certificates bearing interest. That seems like an attempt to convert a certificate of stock into a security for a loan, either permanently or temporarily. But if this may be lawfully done, the company cannot compel the holder to accept payment of such interest in the bonds of the company, but such a vote may operate as an implied ratification of the act of the officers of the company in issuing the certificate.[6]

[5] Furness *v.* Caterham Railw., 25 Beav. 614; s. c. 4 Jur. N. S. 1213.

[6] McLaughlin *v.* D. & M. Railw., 8 Mich. 100. An important question has recently been determined in the Court of Chancery in Maryland, in regard to priority of lien, as between mere certificates issued by a railway company, pledging the income of the road for the payment of interest, and the ultimate redemption of principal, called "Income Bonds," and a subsequent formal mortgage of the road and its appurtenances. These certificates purported on their face to be secured by a "specific pledge of the income of the road"; and were sold, under the express assurance from the directors and agents of the road that no subsequent mortgage of the road would be executed till the final redemption of these bonds.

The bill was brought by certain holders of these bonds, on behalf of themselves and all others standing in the same relation who might choose to come in under the bill, thus being in the nature of a creditor's bill. It was brought against the company, the Central Ohio Railway, and the agents who effected the sales of such bonds in the market, and made the representations upon which the purchases were made for the purpose of establishing the prior equitable lien of the income bonds over the subsequent formal mortgage. This decision was reversed upon the proofs merely. Garrett *v.* May, 19 Md. 177. But we deem the concluding portion of the opinion of sufficient importance to be given at length for its general bearing and upon similar questions.

"The next question is, did the pledge of the income bonds form a lien in equity upon the land, &c.? If it had been given by a formal recorded deed, or by devise, the decisions in Maryland referred to would so determine. But the case in Simons's Report is relied on for a contrary doctrine. The mere legal title to property, without any equity to sustain it, would present a different case; but where the legal and equitable estate passes it would confer a right which the holder of it, without special notice of a prior equity, could not be divested of. That is, however, not this case, for here it rests chiefly, if not entirely, on the notice and knowledge of the defendants, that a prior equitable lien existed by the terms of the income bonds on the very tolls and earnings of the road (which I regard as meaning the *income* of the road); in other words, the third mortgage conveyed the corpus or property, before *specifically pledged* by these very defendants and the railroad company, which they now hold and set

5. The Chancery Court of another state from that where a railway corporation exists cannot afford any remedy against the com-

up in derogation of the equity of the income bonds, known to them to exist, and of which they had notice, and the Garretts received and hold now for their own security the third mortgage bonds, with express notice of the equitable liens of the income bonds, which they themselves had previously sold to the complainants in this suit.

"In the case of Smith *v.* Richards, 13 Peters, 36, 37, the Supreme Court of the United States have affirmed the doctrine that a party selling property must be presumed to know whether the representations he makes of it are true or not. And in a court of equity, representations founded on a mistake resulting from negligence are binding, whatever may have been the motive of the seller, and where, as in this case, the party whose conduct and conversations have been relied on, was the agent of the railway company and himself a creditor, how much stronger the application of this decision.

"Does it make any difference, in such a case, whether the conversations or representations were before or after the sale of the bonds?

"An injury, arising from the suppression of the truth, is as prejudicial as that from the assertion of falsehood. Allen *v.* Addison, 7 Wendell, 9. So that if at the time of selling the income bonds, the Messrs. Garrett knew that a third mortgage would be issued in a few months thereafter, which would practically supersede and impair the security of the income bonds, and that they, as the *agents and creditors* of the Central Ohio Railway, would hold the last-named bond as of a higher lien and preference over the income bonds, and to their disparagement, then how forcibly would the doctrine apply, that they were suppressing a most vital and important fact, which it was their duty to communicate, and from the concealment of which the complainants are now entitled to relief for the injury thereby occasioned; that the Messrs. Garrett must have known the purposes and policy of *their principals* (the road) cannot be doubted, and they knew better than any one else at the time what securities would be given to its creditors if any were to be issued, being themselves, as their answer shows, largely interested as creditors to the amount of three or four hundred thousand dollars, and holding as they now do the third mortgage bonds to a large amount, as security to themselves over and above the income bonds also held by them, and which they doubtless have subordinated in rank to the third mortgage bonds, having a much larger amount of the third mortgage bonds to secure their whole debt without in any event being compelled to fall back on the income bonds, which they regard as inferior in priority to the third mortgage bonds which they now hold.

"On the whole, therefore, I am of opinion that the complainants are entitled to such relief as a court of chancery in such a case can give. But before indicating the nature of that relief and the form of the decree, I will refer to some of the cases relied on at the bar.

"In the case of Myatt *v.* W. Helens' Railw. Company, 42 E. C. Law Reports, 715, the company, by act of parliament, was authorized to borrow money on a mortgage *of the rates and tolls* of their road, and it was held that the mortgagee could not take the land in that case, and Lord *Denman* says, in his opinion, that

pany for not declaring or paying the stipulated dividend upon preferred or guaranteed stock, nor can such holder maintain an

he sees no reason to suppose the legislature *intended* so inconvenient a thing as to compel the company to part with that property by which the undertaking was to be carried on.

"The case, 13 Simons's Reports, Perkins *v.* Deptford Pier Company, 281, much relied on, was on a similar special act, which authorized the borrowing of money on the tolls and rates *alone* by special mortgage and not referring to the land, &c.; but in the Maryland reported cases, see Torrence *v.* Torrence, Coakley and Wife *v.* Myer, the true rule is laid down when a devise of the rents conveys the land; also it was decided in the case of Hudson *v.* Walker & Vance, 2 Harris & Gill, 415, that the grantee of a second mortgage recorded *with notice of a prior mortgage which was not duly recorded*, is bound by the equitable rights of the first mortgagee, unless upon inquiry he is led to believe that the encumbrance was removed, 'that was as to personal property, but the principle should apply as fully in equity to real estate.' (See page 341, opinion of the court; see also, 9 Gill, 315, as to notice.) And judge Story, in his work on Equity, vol. 2, section 1213, who says, following out this doctrine, 'It is a general principle in equity, that as against the party himself, or any claiming under him, voluntarily or with notice, such as an agent, that is, under an agreement or on contracts, creating a lien on real estate or personal property, it raises a trust.' Without therefore longer pausing to examine all the authorities, English and American, cited and to be found in the books, I am clear in regarding this case as one on the evidence, coming within the operation of that rule of equity which names an agreement or contract creating a lien binding on the parties or party, who, with *knowledge* and *notice* of such agreement or contract, afterwards by a subsequent agreement or contract by specialty or otherwise, attempts to supersede the first contract or impair the liens arising under it; and a court of equity should give relief in such a case. I shall decree, therefore, in conformity to this opinion, and upon the fullest authorities, as I understand them, that the defendants, especially the Messrs. Garrett & Sons, who are within the direct jurisdiction of a Maryland court of chancery, shall hold the third mortgage bonds now in their hands, in trust, for the benefit of the complainants in this case, whose prior equitable lien under the income bonds I regard as paramount, and to be preferred over the third mortgage bonds, so held by the defendants as hypothecated to them, or as agents of their co-defendants, the Central Ohio Railway Company; and that they shall also account and set forth the nature and amount of their claim against the said Central Ohio Railway Company, and further show how the same was incurred, so that a full account be rendered in the premises, and the injunction heretofore issued is therefore continued.

"It has been objected, however, that as the Central Ohio Railway Company and their property are in the state of Ohio, no decree of this court could be made available, and that no jurisdiction can, therefore, be had of the case; from this I dissent, and, indeed, it was not pressed in the argument.

"A court of chancery in Maryland has jurisdiction over the parties defendant answering this bill, and submitting themselves to its jurisdiction, certainly over the Messrs. Garrett & Sons, the agents here of said road, whose agree-

action at law against the corporation for not paying such stipulated dividend, the same having never been declared by the directors.[7] This was a case where the certificate, in terms, guaranteed the payment of a dividend of *ten per cent* annually, and a *pro rata* share in any surplus: and the counsel claimed a distinction between preferred and guaranteed stock. There is, unquestionably, a difference, in form, but probably no essential difference in the legal effect, of the two. They both contain a virtual stipulation of the corporation, that the requisite dividend shall be declared out of the first surplus earnings of the company. And to this extent the duty may be enforceable, by a court of equity in the same state, or by writ of mandamus. But if there be a deficiency of the earnings to warrant the dividend, no court can supply the defect.

*SECTION V.

Investing Trust Funds in Railway Securities.

1. *General duty of trustees, in regard to making investments.*
2. *English courts have regarded railway securities too uncertain for such purpose.*
3. *Statement of a case upon the subject, in New Hampshire.*

§ 238. 1. A trustee is ordinarily excused where he exercises his best judgment, and the fund is lost or diminished by what *appears

ments, contracts, and acts in Maryland must bind their principals, and a decree, therefore, would be of as much efficacy as if all the defendants resided in Maryland.

"It has been also objected, but not urged in the argument, that if representations were made by the Messrs. Garretts, upon which the complainants purchased the income bonds in question, they were verbal, and not being in writing, under the statute of frauds, cannot be regarded.

"And that this being in the nature of a creditor's bill, and the Central Ohio Railway Company not being insolvent, on a prayer for distribution, this court ought not to interfere.

"I do not concur in this view, and, regarding the evidence as admissible, and the rights of the parties litigant properly under the jurisdiction of a Maryland court of chancery, upon this record and case I shall so adjudge and decree.

"A decree in accordance with this opinion will be signed by me."

[7] Williston *v.* Michigan Southern & N. I. Railw., 13 Allen, 400. But where the corporation issues certificates payable at a day named, with the condition that if at that time there should not be money sufficient in the treasury to pay the whole amount, the holders shall receive their proportion of the same, the holder cannot maintain an action without proving that the company either at the time specified for payment, or at least before the suit brought, possessed the

to be a mere casualty. But he is always *prima facie* liable for any such loss, and ultimately, unless he can show very * clearly that he was not in fault. By this is understood, commonly, that he invested and managed the fund as a prudent * man would do with his own. And as the purpose of such funds ordinarily is to raise an annuity, it must be invested in some mode; and the most that human foresight can accomplish is, to make a wise selection of the different opportunities which offer.[1]

2. But where, by the terms of a settlement, the trustees had authority to invest in the public stocks or real securities, it was held a breach of trust to invest the trust fund in railway debentures, not so much because this might not be fairly regarded as a real security, as on account of the uncertain character of the security.[2]

3. In a recent case[3] in New Hampshire, this subject is discussed at length, and the following results arrived at by a judge of extensive learning and experience, Chief Justice *Woods:* 1. Where money is bequeathed to a trustee, "to be invested and * improved according to his best skill and judgment, it is his duty to invest it in safe securities, and his discretion, in the selection of investments, is not enlarged by the words "according to his best skill and judgment." 2. If a trustee's authority enables him to invest in stocks,

money for paying the full amount. But the question of ability to pay is not to be decided by the directors of the company, but by the court, having regard to the existing liabilities and funds of the corporation, and any contingencies to which they may be exposed, demanding increased outlay. Barnard *v.* Vt. & Mass. Railw., 7 Allen, 512.

[1] 2 Story, Eq. Jur. §§ 1269, 1271; Clough *v.* Bond, 3 Mylne & Craig, 490, 496. But it is said, if the trustee mix the fund with his own money, or invest it in an improper stock, he is liable. 2 Story, Eq. Jur. §§ 1270, 1271; Massey *v.* Banner, 4 Mad. Ch. 413; Thompson *v.* Brown, 4 Johns. Ch. 619; Knight *v.* Lord Plimouth, 3 Atk. 480; Powell *v.* Evans, 5 Vesey, 839.

[2] Mant *v.* Leith, 15 Beav. 524; s. c., 10 Eng. L. & Eq. 123. In the case of Ellis *v.* Eden, 25 Beav. 482; s. c., 30 L. T. 601, where one devised to trustees certain securities for the payment of legacies, and directed it to be reduced to cash, excepting, among other things, such as consisted of "stock in the foreign funds," it was held that this term included the American state stocks of Virginia, Massachusetts, &c., but did not include Boston water scrip, or bonds of the Pennsylvania Railway. But bonds issued under special legislative authority, by a state or city, for the purpose of aiding in the construction of a railway are public stocks, and taxable, as such, under the Massachusetts statutes. Hall *v.* County Commissioners, 10 Allen, 100.

[3] Kimball *v.* Riding, 11 Foster, 352.

* 602, 603, 604

they should appear to have been at the time, productive, and to have had a market value, depending upon their income, and not upon contingencies. 3. Shares in a contemplated railway are not such.

SECTION VI.

Bona Fide Holder of Railway Bonds, with Coupons, may enforce them.

1. *Railway bonds payable to bearer, with coupons, negotiable securities.*
2. *This rule extends both to the bonds and coupons for interest.*
3. *Same rule extended to bonds issued by municipal corporations.*
4. *In this country, railway bonds issued in blank, may be filled up with name of last holder.*
5. *In England, the money must be obtained for a purpose within the scope of the business of the company and power of the directors.*
6. *Sometimes held that no action will lie on the coupons.*
7. *Rights of transferee in England.*
8. *Where third parties have become affected by the entry upon the books of the company.*
9. *Where company is allowed to mortgage, but prohibited from issuing, bills of exchange, a mortgage given to secure a debt evidenced by bills of exchange, held good.*
10. *Lands mortgaged without authority equally divided among all the creditors standing in the same right.*

§ 239. 1. In a late case in New Jersey,[1] it was decided by the Court of Appeals, that bonds with coupons payable to bearer, issued by the plaintiffs, passed by delivery from hand to hand the same as bank-notes, and that a *bona fide* purchaser for value, without notice of any prior defect in the title from the company, might enforce them, independent of all equities between the company and the first holder. This decision is approved in the late case of Mechanics' Bank *v.* New York & New * Haven Railway.[2] The

[1] Morris Canal & Banking Company *v.* Fisher, 1 Stockton, Ch. 667. Professor Parsons, in his work on Contracts, vol. 1, 240, says, "It may, however, be here said, that we regard the English authorities as making all instruments negotiable which are payable to bearer, and which are also customarily transferable by delivery, within which definition we suppose the common bonds of railroad companies would fall." The same principle is laid down in Eaton & Hamilton Railw. *v.* Hunt, 20 Ind. 457; Conn. Mutual Life Ins. Co. *v.* C., C. & C. Railw., 41 Barb. 9; Maddox *v.* Graham, 2 Met. (Ky.) 56; Commonwealth *v.* Perkins, 43 Penn. St. 400.

[2] 3 Kernan, 599. And in the late case of Brainerd *v.* New York and Harlem Railw., 25 N. Y. 496, it was held that the bond of a railroad corporation pay-

same principle has been extended to certificates of deposit,[3] and to state bonds.[4] The English courts have adopted the same rule in regard to bonds of the King of Prussia;[5] to Exchequer bills,[6] and bonds of the government of Naples, when put in a condition to be negotiable in that country.[7]

2. We think there can be no reasonable doubt of the soundness of the principle as applied to railway bonds, made payable to bearer, with coupons attached, for the payment of interest. And we are confident this is the view taken of this question generally, by commercial men and companies, both as to the bonds, and the coupons.[8]

able to A. B. "or his assigns," was in the nature of commercial paper, negotiable by delivery under an assignment in blank, and not a specialty, subject to equities between the corporation and the person named in the bond as the primary payee.

[3] Stoney *v.* American Life Ins. Co., 11 Paige, 634.

[4] Delafield *v.* State of Illinois, 2 Hill, 159.

[5] Gorgier *v.* Mieville, 3 B. & Cress. 45.

[6] Wookey *v.* Pole, 4 Barn. & Ald. 1.

[7] Lane *v.* Smyth, 7 Bing. 284.

[8] Carr *v.* LeFevre, 27 Penn. St. 413, where the court held such bonds may be sued in the name of the holder, and that possession is *prima facie* evidence of ownership. And where a suit is brought for the collection of the interest due on such bonds, evidenced by coupons, the court will not allow the payee of the bond to take judgment for the interest due, until the coupons are produced. Williamson, Trustee, *v.* The New Albany & Salem Railw., in the Circuit Court of the U. S. before Mr. Justice *McLean*, *ante*, § 235; Morris Banking & Canal Co. *v.* Lewis, 1 Beasley, 323, where it was held that coupon bonds of an incorporated company are transferable by delivery solely. And see Brookman *v.* Metcalf, 32 N. Y. 591.

But in Jackson *v.* York & Cumberland Railw., 48 Maine, 147, the court say that no action can be maintained in the name of the assignee of such coupons, where they contain no negotiable words, nor language from which it can be inferred that it was the design of the corporation issuing them to treat them as negotiable paper, or as creating an obligation distinct from and independent of the bonds to which they were severally attached when issued; that proof of custom, as to the negotiability of such coupons, is inadmissible. See Augusta Bank *v.* Augusta, 49 Maine, 507. This rule is contrary to the great majority of the cases. See County of Beaver *v.* Armstrong, 44 Penn. St. 63; White *v.* Vermont and Massachusetts Railw., 21 Howard (U. S.), 575; Chapin *v.* Vermont & Massachusetts Railw., 8 Gray, 575. In the Blakely Ordnance Company, Law Rep. 3 Ch. App. 154, the general question of the negotiability of debentures under the seal of a joint-stock corporation, is somewhat discussed by the late Lord Justice *Rolt*, a very able and learned judge. His lordship

*3. And in a case in the state of Mississippi, the question was considered by their court of errors, in regard to the bonds issued by the city of Vicksburg,[9] and the *conclusion arrived

comes to the conclusion, that such contracts do create a *prima facie* debt against the company, but not of a negotiable character, or upon which the *bona fide* holder could maintain an action at law in his own name. But being the debt of the company, the *bona fide* holder was allowed to prove the same, as a claim before the official liquidator, in the winding-up proceedings of an insolvent company. And upon the authority of *In re* Agra and Masterman's Bank, Law Rep. 2 Ch. App. 391, it was held, that such securities, in the hands of a *bona fide* holder, will exclude all equitable defences on the part of the company against the original holder. This seems, virtually, although not precisely in form, to recognize these debentures as negotiable securities, in England, and it is but another instance of the extreme difficulty of the courts maintaining any position in conflict with the established commercial usages of the country. But in the Natal Investment Company *in re*, Law Rep. 3 Ch. App. 355, Lord *Cairns*, Lord Justice, a very high authority, held that in order to exclude the equities existing between the original parties, in the hands of a *bona fide* holder of such debenture, it must appear very clearly, that such was the intention of the parties to the original contract. See also Aberaman Iron Works *v.* Wickens, L. R., 5 Eq. Cas. 485, 517. Where bonds issued by a municipality in aid of a railway were declared by a statute to be negotiable, and were made payable to the company, "its assignee or bearer," it was held, that they were good in the hands of an innocent holder, though they might not be valid between the original parties. Maddox *v.* Graham, 2 Met. (Ky.) 56. Where bonds were allowed to be issued after certain notice, it was held that issue imported compliance with all prerequisites to such issue, and that the purchaser was not bound to any further investigation. Pearce *v.* Madison, &c., Railw., 24 Howard (U. S.), 442. And in Junction Railw. *v.* Cleneay, 13 Ind. 161, it was held that suit could be maintained upon coupons without the production of the bonds to which they had been attached. And see Brainerd *v.* N. Y. & Harlem Railw., 25 N. Y. 496; Conn. Mutual Life Ins. Co. *v.* C., C. & C. Railw., 41 Barb. 9.

[9] Craig *v.* The City of Vicksburg, 31 Mississippi, 216. But it is said that a decision was made in Alabama, many years since, by a divided court, against the rule here adopted, but that it had been overruled.

The case of Zabriskie *v.* The Cleveland, Columbus & Cincinnati Railw., before the Circuit Court of the United States for the Northern District of Ohio, 10 Am. Railw. Times, No. 15, is justly regarded as an important one. The opinion of Mr. Justice *McLean* discusses many points incidentally connected with the subject. But the decision seems to be placed mainly upon the ground, that the bonds having gone into the market, in the form of negotiable securities, payable to bearer, and the company having at a meeting (although defectively called) ratified the issue, and this being known, for more than two years, to the agent of the complainant, residing abroad, before any movement was made by any party to enjoin them, the acquiescence was such as to conclude the plaintiff,

at, that such bonds, payable to bearer, pass from hand to hand, by delivery, like bank-notes, and that the holder's title depends upon the fact of his being the bearer *bona fide*, and that, as such, he may recover of the maker without giving further proof of title.[10] And that the maker can only defend an action so brought by the bearer by proving that the holder had knowledge of the defence at the time, or before, he received the bond.[11]

4. In a recent case[12] in the United States Supreme Court, this subject was examined, and the authorities, both in this country and in England, extensively reviewed, and the *conclusion reached, that railway bonds issued in blank, no payee being named, but delivered to a citizen of Massachusetts for value, and having passed

who sued for an injunction, as a stockholder, on the ground that the indorsement and payment of these bonds by the defendants would tend to diminish their profits. This ground seems to us entirely satisfactory. It is questionable, whether the guaranty of the bonds by defendant is not, under the statutes in force in Ohio, allowing railway companies to aid in the construction of other connecting railways, "by subscription to their capital stock or otherwise, *prima facie* to be regarded as a legitimate commercial contract; and if so, it is not such an act as is calculated to put the purchaser on his guard, and thereby affect him with constructive notice of any latent infirmity in the prior proceedings of the company in making the guaranty. This is the pervading view maintained in the opinion.

But it is here conceded, that, if the charter of the company or the general laws prohibit such a contract being entered into by such a corporation, the contract, although made in the form of a negotiable security, is void in the hands of a *bona fide* holder for value. Root *v.* Goddard, 3 McLean, 102; Root *v.* Wallace, 4 id. 8. And it seems to be conceded, as a general rule, that in regard to the requisite formalities, either of the charter or the general laws of the state, one who takes negotiable securities in the market in the due course of business, is not obliged to make inquiries beyond the point of the capacity of the parties to contract, in the particular form presented upon the face of the paper.

And where the records of the company show the requisite formalities to have been complied with, this, as between the company and third parties, will be held conclusive against them. And this case was affirmed in the Supreme Court of the United States. Zabriskie *v.* C., C. & C. Railw., 23 How. (U. S.) 381. *Ante*, § 23.

And see Madison, &c. Plank-Road Co. *v.* Watertown & Portland Plank-Road Co., 7 Wisconsin, 59; Madison & Indiana Railw. *v.* Norwich Savings Society, 24 Ind. 457.

[10] And coupons on such bonds cannot be attached on trustee process. Smith *v.* Ken. & Portland Railw., 45 Maine, 547.

[11] Morris Banking & Canal Co. *v.* Lewis, 1 Beasley, 323.

[12] White *v.* Vermont and Massachusetts Railw. Co., 21 How. (U. S.) 575. See also Chapin *v.* Same, 8 Gray, 575.

through many hands, might be filled up payable to the last holder for value, and a suit maintained in his name in the circuit courts of the United States. It is there said by Mr. Justice *Nelson*, in giving judgment, that "the usage and practice of railway companies and of the capitalists and business men of the country, and decisions of courts, have made this class of securities negotiable instruments." The late English cases, wherein it was held that instruments issued in blank were void, were considered and overruled [13] by the court in the case last cited.

5. But the English court of Common Pleas held, in a recent case,[14] that a bill of exchange drawn on behalf of a joint-stock company, in the form prescribed by statute, does not bind the company, even in the hands of a *bona fide* holder, if the bill be drawn for any purpose not within the scope of the business of the company or the power of the directors.[14]

6. But it has been held, contrary to the general opinion, that no action will lie upon the interest warrants or coupons, independent of the bonds upon which the interest accrued, but that the action must be upon the bonds.[15]

7. And where the debentures or mortgage securities of a railway company had been issued by the company to a party under a contract, which amounted to a fraud upon the shareholders, and they were transferred by such party in the market to *bona fide* purchasers, it was held that such purchasers took the securities subject to all equities existing between the prior parties.[16]

And where it appeared that the purchasers had procured the entry of a transfer of the debentures to them to be made in the books of the company, and had also received from the company interest or dividends upon the debentures, such entry and dividends not having been communicated to the shareholders, it was held that they were not bound thereby, and that the debentures could not be enforced against the company.[16]

[13] See *ante*, § 35.

[14] Balfour *v.* Ernest, 5 C. B., N. S., 601; s. c., 5 Jur. N. S. 439.

[15] Crosby *v.* New L. W. & P. Railw. Co., 26 Conn. 121. See also Shoemaker *v.* Goshen, 14 Ohio N. S. 569. But these coupons have been repeatedly recognized as valid evidence of the indebtedness of the corporation, and as drawing interest after due, where payment had been unjustly neglected or refused. Aurora City *v.* West, 7 Wallace, U. S. *Ante*, § 239, pl. 6; Miller *v.* R. & W. Railw., 40 Vt. 399.

[16] Athenæum Life Ins. Co. *v.* Pooley, 3 De G. & J. 294; s. c., 5 Jur. N. S. 120. *Ante*, § 234, n. 10.

*8. It might perhaps merit a different consideration, where the transfer of the debentures being entered upon the books of the company, third parties had become *bona fide* purchasers in faith of the title being where it appeared to be upon the books of the company.[17] But it is said in the former case,[16] that it is the duty of the purchaser to ascertain whether they are tainted with fraud or irregularity, and that the facts of the company registering the transfers and paying dividends without objection, are no conclusive estoppel against their disputing the binding force of the debentures until they are shown to have been ratified by the shareholders.

9. Where the directors of a company were prohibited issuing bills of exchange, but had power to borrow money on mortgage, they gave bills to secure an existing debt, and executed a mortgage at the same time, subject to redemption upon payment of the bill: held, upon a bill for foreclosure, that the mortgage was given to secure the debt, and not the bills merely; and that upon a bill of foreclosure the debt of the company must be treated as valid until set aside by an independent proceeding.[18]

10. And where the company mortgage lands to secure their indebtedness, contrary to the provisions of the powers granted them, any other creditor, standing in the same right with the mortgagee, may maintain a bill in equity to compel the equal distribution of the mortgaged estate among all the creditors standing in the same right.[19]

[17] Fisher *v.* Essex Bank, 5 Gray, 373; Sabin *v.* Bank of Woodstock, 21 Vt. 362.

[18] Scott *v.* Colburn, 26 Beavan, 276; s. c. 5 Jur. N. S. 183.

[19] De Winton *v.* Mayor of Brecon, 26 Beav. 533; s. c. 5 Jur. N. S. 882.

*CHAPTER XXXIV.

DIVIDENDS.

SECTION I.

When Dividends are declared, and how payable.

1. *Dividends should be declared only from net earnings of the company.*
2. *Right of shareholders to dividends declared is several, but joint before declared.*
3. *Lien upon shares creates a lien upon dividends.*
4. *Surety on bank note or bill may restrain transfer of principal's stock.*
5. *Action will not lie against company for dividends till demand.*

§ 240. 1. DIVIDENDS are only to be declared out of the actual earnings of the company; and if they be declared when not earned, and so virtually payable out of the capital, or, which is the same thing, out of money borrowed, and this be done for the purpose of increasing the price of shares or the credit of the company (and it is difficult to conjecture any other motive, unless done under a misapprehension of the true state of the company's finances), it is a fraud upon the shareholders, and upon the public also, and any one injured thereby, as we have before seen, is entitled to relief either in equity or at law.[1]

2. After a dividend is declared, each party entitled has a right in severalty to his particular proportion.[2] And therefore, one

[1] *Ante*, § 41, 211. But a court of equity will not restrain the company from paying a dividend upon the ground merely that the directors have acted in violation of their duty to the public. Brown *v.* Monmouthshire Railw. & Canal, 13 Beav. 32; s. c. 4 Eng. L. & Eq. 113; Stevens *v.* South Devon Railw., 9 Hare 313; s. c. 12 Eng. L. & Eq. 229; *ante*, § 211. But an action may be maintained by the receiver of an insolvent corporation against the stockholders to recover the sums received by them as dividends, while the company was insolvent. Osgood *v.* Laytin, 40 N. Y. (3 Keyes) 521.

[2] Coles *v.* Bank of England, 10 Ad. & Ell. 437; Davis *v.* Bank of England, 2 Bing. 393; s. c. 5 B. & C. 185; Feistel *v.* King's College, Cambridge, 10 Beav. 491; City of Ohio *v.* Cleve. & Toledo Railw., 6 Ohio N. S. 489; Carpenter *v.* N. Y. & N. H. Railw., 5 Abbott, Pr. 277. After a dividend is declared by the directors of a corporation, if payment of his proportion is refused to any stock-

*party cannot bring a bill on behalf of himself and other shareholders, to enjoin the payment of a dividend already declared, until the entire line is opened, even where this is one of the express requirements of the charter of the company.[3] For in such a proceeding the interests of those entitled to the dividend, after it is declared, become not only several and distinct, but positively adverse to each other, so that one cannot be said, in any proper sense, to represent the others as to a dividend already declared.[3] But as to future dividends, one shareholder may bring a bill on behalf of himself and others standing in the same relation, to enjoin the company from declaring future dividends, until they have completed their whole line according to the requirements of their charter.[3] And as to dividends already declared, a bill brought in such a form as to make all parties interested, parties to the bill, might enable a court of equity to restrain its payment.[3]

3. A lien upon shares gives as an incident a lien upon the dividends, and a right to receive and retain them.[4]

holder, he may recover it in an action of money had and received to his use against the corporation. But the directors have a right to select a banking-house of good credit, and constitute it their agents, and may lawfully deposit in such banking-house money to pay the dividends, giving to each stockholder notice of such deposit. And if the stockholder, after having received due notice, neglect to draw his money within a reasonable time, and a loss is then incurred by a failure of the bank, such loss will fall wholly upon the stockholder, and he cannot call upon the company to reimburse him, but the burden of proof to show that due notice was given lies upon the company. The question what will constitute a sufficient notice is also ably discussed in the same case. King *v.* Patterson & Hudson River Railw., 5 Dutcher, 82.

[3] Carlisle *v.* Southeastern Railw., 13 Beav. 295; s. c. 2 Hall & T. 366; 1 Mac. & G. 689; 6 Railw. C. 670. So also where the company have no surplus earnings, they may be restrained from paying a dividend already declared. Carpenter *v.* N. Y. & N. H. Railw., 5 Ab. Pr. 277. And the declaring of dividends will be enjoined, after the capital has been increased by an accumulation of surplus on the discovery of a deficit caused by the fraud of an officer of the company. Fawcett *v.* Laurie, 1 Drew. & Sm. 192; s. c. 8 W. R. 699. But a corporation, after having declared a dividend and paid it to the other stockholders, cannot defend against a suit to recover the same by one stockholder, on the ground that the dividend has not been earned, and that its payment would withdraw a part of the capital of the company. Stoddard *v.* Shetucket Foundry Co. 34 Conn. 542.

[4] Hague *v.* Dandeson, 2 Exch. 741. A dividend upon stock paid after the death of the shareholder is not apportionable between tenant for life and remainder-man. Plumbe *v.* Neild, 6 Jur. N. S. 529. See Wright *v.* Tuckett, 1 Johns. & H. 266. Dividends declared on the shares of a testator after his death, but

*4. And it has been held, that a surety of a shareholder may require the company to apply dividends due the principal, upon the debt, or prohibit the transfer of the stock where they hold a lien upon it, under penalty of his discharge; but without this requirement the corporation might allow the transfer to be made, without losing any right against the surety.[5]

5. It seems to be settled as a general rule, that an action will not lie against the company for dividends declared, until demanded, nor will interest accrue, or the statute of limitations begin to run.[6]

in respect of the profits made by the company in his lifetime, form part of the income, not of the *corpus* of his estate. Bates *v.* McKinley, 31 Beav. 280; s. c. 8 Jur. N. S. 299. And see, as to the apportionability of dividends under the English practice, Maxwell *in re*, 1 H. & M. 610; s. c. 9 Jur. N. S. 350; Scholefield *v.* Redfern, 2 Drew. & Sm. 173; s. c. 9 Jur. N. S. 485. See also Granger *v.* Bassett, 98 Mass. 462.

[5] Perrin *v.* Fireman's Ins. Co., 22 Ala. 575.

[6] State *v.* Baltimore & Ohio Railw., 6 Gill, 363; Ohio City *v.* Cleveland & Toledo Railw., 6 Ohio N. S. 489; Phila., Wilmington, & Balt. Railw. *v.* Cowell, 28 Penn. St. 329. An interesting case was recently decided in Pennsylvania, involving the rights of holders of scrip certificates issued in payment of stock dividends. The Lehigh Coal and Navigation Company, which was restricted to six per cent dividends out of profits to its stockholders, on the basis of an increased business and the enhanced value of its works and property, in accordance with a resolution of the stockholders, issued scrip certificates from time to time, entitling the holder to additional shares of stock, distributing them ratably among share and scripholders, in proportion to the amount held at the date of issue. The resolution, embodied in the scrip, provided that the scrip should not be entitled to any dividend until the funded debt of the company should be paid off, or adequate provision made for its discharge when due and payment demanded, nor until conversion of such scrip into stock. After conversion, certain of the scripholders claiming the back dividends which had been declared on the stock from the date of issue to the conversion of the scrip, it was held that the rights of the scripholders were to be measured by the contract under which it was issued, of which the scrip alone was the evidence; that this contract was but an engagement that the scripholders might become shareholders after payment of or provision made for the funded debt of the company; and that the scripholders were not entitled to dividends upon the scrip, nor upon the stock into which such scrip had been converted, except such as had been declared subsequent to the conversion. Brown *v.* Lehigh Coal & Nav. Co., 49 Penn. St. 270.

*SECTION II.

Party entitled to Dividends where Stock has been fraudulently transferred.

1. *Fraudulent transferee not entitled to dividends, but subsequent* bonâ fide *purchaser may be.*
2. *But the* bonâ fide *owner may so conduct as to forfeit his claim.*
3. *One who buys stock in faith of the title on company's books may hold, as against company.*

n. 1. *Review of English decisions.*
4. *Transfer agent not authorized to bind company by representation.*

§ 241. 1. The party who has obtained a fraudulent transfer of stock into his own name, upon the books of the company, is never entitled to the dividends, and if the fraud is ascertained before the dividends are paid, the payment to such party may lawfully be resisted. But it often happens that the dividends are paid to such party before the fraud is discovered, or the shares may have been transferred to some innocent purchaser, in faith of the title of such fraudulent party appearing upon the books of the company. In such case, where there was no fault upon the part of the original owner, or where the transfer is made by a forged power of attorney, both the original owner and the innocent purchaser will be entitled, as against the company, to demand the dividends or their equivalent. The first, because he is still the owner of the shares, not being in any just sense bound by the transfer which the company have allowed upon their books without his concurrence; and the latter, because he has been induced to pay his money for stock which the company allowed to stand upon their books, in the name of the vendor. These joint-stock companies are bound to look into the title of any one who claims to have stock transferred into his name on the books of the company.[1]

[1] Davis *v.* The Bank of England, 2 Bing. 393. *Best*, Ch. J., says, "It is the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorized to do so. They may take reasonable time to make inquiries and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder who is to suffer, if, *for want of inquiring* (and it does not appear that any inquiry was made in this case), they are imposed upon, and allow a transfer to be entered in their books, made without a proper authority.

"We cannot do justice to this plaintiff unless we hold that the stocks are still his. If we say that they have been transferred, and that he must take a verdict

* 2. In the case just cited, the former owner of the stock learned of the fraudulent transfer some months before he * informed the

for compensation for the loss of them (as these transactions occurred four years ago), the highest sum that we can give upon this verdict will fall very short of what it will cost the plaintiff to replace his capital, and he must besides lose all the dividends that have become due since the trial, which took place nearly two years ago. In every case that can occur, the stockholder (if he is to proceed for compensation) must run the risk of having his capital and income diminished by a rise in the funds between the verdict and judgment, and if that judgment be delayed, as will frequently happen by the occurrence of any legal difficulty, he will lose the dividends that would have become due to him during that time. This case shows that time may be several years. It may be said he may prevent this by replacing the stock, but it may frequently happen that he is not in a condition to do this. Another consequence of the stocks being considered as transferred will be most alarming to those who live at a distance from London, and receive their dividends by attorney; namely, that their claim to compensation in case their stocks could be transferred without their authority may be barred by the statute of limitations. What has lately occurred has shown us that the forging of powers of attorney to transfer stock may be concealed for more than six years, and the cases of Battley *v.* Faulkner, 3 B. & A. 288; Short *v.* M'Carthy, id. 626, and Brown *v.* Howard, 4 Moore, 508, prove that the statute of limitations begins to run from the time of the act being done that gives occasion to the action, although it was not known to the party who suffers from it. I can find no case in which the question, whether the stock is transferred by the act of the bank, has been raised. There is one in Bernardiston's Reports, p. 324, where a man of the name of Edward Harrison got South Sea stock which belonged to another Edward Harrison, put to his account in the books of the company, and then transferred this stock to his broker to sell, and which stock the broker sold. A bill was filed by the executor of Edward Harrison, the owner of the stock, against the executor of Edward Harrison, who so fraudulently procured it to be put into his name, and the Chancellor said, that the plaintiff should have a quantity of stock equal to that transferred bought for him, or else have a satisfaction for the stock equal to what it was worth at the time it was sold out; and his lordship added, there is another and more difficult question, and that is, how far the company may be liable to make satisfaction in case there are not sufficient assets left by the Harrison who improperly possessed himself of this stock.

"In this case it seems to be assumed that the stock had passed out of the name of the owner by this transfer under a fraudulent assumption of his name, although he never assented to such transfer; but whether it had so passed or not was not considered, and I, therefore, cannot think this case any authority against our opinion, if it were correctly reported. I think, however, that this case is not correctly reported by Bernardiston: the same case is to be found in 2 Atkins, p. 120, in the name of Harrison *v.* Harrison. In this report it appears that the stock was transferred by a trustee, and if so, the question whether a transfer unauthorized by the stockholder would alter the property in the stock could not arise; the trustee having a legal authority to transfer, although he

* 614, 615

company, and in the mean time the offender left the country, and this was held no bar to his claim to the dividends. * But it was considered that in this case, if the bank had paid the dividends to the fraudulent party, during the interval that the plaintiff withheld this information, he could not have recovered for such dividends. But a misprision of felony shall not have the effect to forfeit stock, to which the plaintiff has an indisputable title. In some of the American courts a similar doctrine is recognized.[2]

might be guilty of a breach of trust by exercising that authority. This circumstance also accounts for the doubtful manner in which Lord *Hardwicke* speaks of the liability of the company to replace the stock. The question there was, whether the South Sea Company were bound to prevent a breach of trust, and not whether a stockholder's name can be taken from the books without his own authority, and the company that has permitted this act not be responsible for the consequence of it. We are not called on to decide whether those who purchase the stock transferred to them under the forged powers might require the bank to confirm that purchase to them, and to pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries. But to prevent, as far as we can, the alarm which an argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfer to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock, as you can that of an estate. You cannot look further, nor is it the practice even to attempt to look further than the bank-books for the title of the person who proposes to transfer to you." See also Taylor *v.* Midland Railw. Co., 28 Beav. 287; s. c. 6 Jur. N. S. 595; Sloman *v.* Bank of England, 14 Simons, 775; Ashley *v.* Blackwell, 2 Eden, 299; Hare *v.* London & N. W. Railw. Co., Johns. Eng. Ch. 722; s. c. 8 Weekly Rep. 352; Swan, *ex parte, in re* North British Australasian Company, 7 C. B. N. S. 400; s. c. 2 H. & C. 175; 10 Jur. N. S. 102.

[2] Pollock *v.* The National Bank, 3 Selden, 274; Sabin *v.* The Bank of Wood-

3. And if the company suffer the stock to stand upon their books, in the name of a naked trustee, without interest, and issue scrip in the name of such trustee, and a *bona fide* purchaser of the stock of such trustee advances money for it, he will be permitted to hold it against any lien the company may have upon it, as against the real owner of the stock.[3]

4. It was recently decided in the Superior Court of the city of New York,[4] that the possession by the transfer agent of a corporation of the transfer books of its stock, and his authority to allow them to be used, do not constitute the *indicia* of an authority to make representations as to the ownership of stock, so as to render the company liable for the falsity of such representations made by him. Nor will the mere permission given by such agent to enter upon such books a transfer of reputed stock, there being no new certificate given, amount to a representation by him that the person making the transfer was the owner of any genuine stock.

SECTION III.

Guaranty of Dividends upon Railway Stock.

1. *Guaranty of dividends upon stock for period of years.*
2. *Rule of damages, in such case.*

§ 241 *a*. 1. Contracts for the guaranty of dividends upon railway stock, as a part of the contract of sale of shares in such * stock, are not uncommon. Questions have arisen in regard to the proper construction of such contracts; whether they have reference to the quality of the stock, or merely to the product, for the particular period.

In a late case in Pennsylvania,[1] a contract of guaranty upon the

stock, 21 Vt. 353; Lowry *v.* The Com. & Farmers' Bank of Baltimore, Cir. Ct. before *Taney*, Ch. J. 1848; Cohen *v.* Gwinn, 4 Md. Ch. Decis. 357. *Ante*, §§ 32, 46 *a*.

[3] Stebbins *v.* Phœnix Fire Ins. Co., 3 Paige, 350.

[4] Henning *v.* New York & New Haven Railw., 9 Bosw. 283.

[1] Struthers *v.* Clark, 30 Penn. St. 210. The exposition of the subject, in the opinion of the court, is clear and satisfactory. Mr. Justice *Woodward* said: —

"Now, dividends mean proportionate shares of the profits earned by the capital stock of a concern. When we speak of dividend-paying stock we characterize the whole capital stock, and express its quality. There is no such

sale of two hundred shares of railway stock, was in these words, that "said stock should yield annually six per cent dividends, for the space of three years from and after" a certain date, and it was held, that the guaranty had reference to the quality of the stock, and not exclusively to the product for the specified term.

2. The rule of damages for the breach of such a contract was held to be the difference in value between the stock sold and *one which would have produced the specified dividends for the term named in the contract.[2] But where a contract was for the delivery

thing as dividends of fractional parts of an entire stock. Certain stockholders of a common stock cannot be entitled to dividends in exclusion of others. Dividends occur to all or none.

"When these parties therefore stipulated that the capital stock of the Rutland and Washington Railway Company, or two hundred particular shares thereof, should 'yield' (a word which implies a natural accretion from the business of the company) a dividend annually of six per cent, they used the common language of the day to express the value or quality of that stock, and if it proved incapable of yielding that measure of profits there was a breach of the guaranty.

"The position and circumstances of the parties, as well as the consideration paid, tended to confirm the conclusion to which their words conduct us.

"Struthers lived in Warren County, Pennsylvania. The contract was made in New York. Clark is said, though I see no evidence of it on the paper-book, to have been the president of this Vermont railway company, but it is certain he was a large stockholder and well acquainted with it. It was a new road, and had not yet acquired any general reputation with which Struthers could be supposed to be acquainted. He was selling Pennsylvania lands to Clark. Now it was not unreasonable that he should require a guaranty of the stock of which he had so little knowledge, nor is it strange that, seeing a responsible man willing to guarantee as a six per cent stock for three years, he should have considered it would be capable of taking care of itself after that period. A railway stock that would yield at that rate in the first three years of its life, would be likely to grow better as it grew older."

[2] The court, upon this point, said, "Such, then, we infer from the circumstances of the parties as well as from their words, was the tenor of their agreement, — a guaranty that the stock was of a quality to yield the specified dividend for three years. But it was not a stock of such quality; on the contrary, it is said to be worthless, or nearly so. Is, then, the measure of damages a matter of doubt? The rule in such cases is the difference between the value of the stock transferred and such a stock as this was guarantied to be. Dyer *v.* Rich, 1 Metcalf, 192. How much more would such a stock have been worth to him than that which he got?

"The defendant imagines that he may escape by paying six per cent per annum for three years on the shares transferred, but such was not his engagement. It was likened in the argument, not inaptly, to a sale of a cow with warranty that she would produce so much milk for a given time. Nobody would

of a bond issued by a railway company, and which guarantied the payment of the same in full, it was held the measure of damages for the breach of the contract to deliver the bond was the value of the bond thus guarantied by the defendant, and this, as against the defendant, must be regarded as the amount of the bond and the interest to the time of giving judgment.[3]

doubt that such a contract would be a warranty of essential and intrinsic qualities in the cow, rather than a promise to pay the buyer the price of so much milk. So we think here. The plaintiff had a right to demand a stock that would yield, in the manner of stocks, the stipulated dividends, and, failing to get it, he is entitled to damages according to the standard indicated."

[3] Shelton *v.* French, 33 Conn. 489.

*CHAPTER XXXV.

RIGHTS OF CREDITORS AND CORPORATORS.

SECTION I.

Dissolution of Railways.

1. *Different modes in which railway companies may be dissolved:* —
(1.) *By act of the legislature.*
(2.) *By surrender of franchise and acceptance by legislature.*
(3.) *By forfeiture, from abuse or disuse of franchises.*
2. *Shareholders not generally liable to creditors.*
3. *Shareholders entitled to proportionate share of net profits.*
4. *Liability of subscribers, when scheme is abandoned.*
5. *Commonly liable for share of expenses.*
6. *Party receiving shares bound by terms of association.*
7. *Not being informed, that deposits not paid, no fraud.*
8. *Shareholders cannot exonerate themselves by contract with directors.*
9. *Corporations cannot give away effects, to prejudice of creditors.*
10. *If charter is repealed, by virtue of power reserved, courts presume it was rightfully done.*
11. *How far shareholders exonerated by transfer or forfeiture of shares.*
12. Bonâ fide *transfer with no trust in favor of vendor, held good.*
13. *Shares subscribed for or purchased in consequence of the misrepresentations of the directors or agents of the company.*

§ 242. 1. A RAILWAY corporation may be dissolved in the same manner as other private moneyed corporations.[1]

(1.) By act of parliament, which alone by the English constitution has inherent power to dissolve or repeal the charter of corporations, although the king may create them.[2] But the failure to hold meetings and elect officers is not, within reasonable limits, to be regarded as a dissolution of the corporation.[3]

(2.) By surrender to the legislature of all its corporate *franchises, and the acceptance of such surrender.[4] But the mere non-

[1] If a corporation once had a legal existence, which is alleged to have been determined, it is necessary that the pleadings should show or set forth particularly the manner in which its corporate powers ceased. Sutherland *v.* Lagro & Manchester Plank-Road Company, 19 Ind. 192. [2] *Ante*, § 204.

[3] Angell & Ames on Corp. § 771, and cases cited; Smith *v.* Steamboat Co., 1 How. (Miss.) 479.

[4] Angell & Ames, § 772; 2 Kent's Comm. 310, and notes; Missouri and Ohio Railw. *v.* State, 29 Ala. 573.

user, or abuse of its corporate franchises, will not amount to a surrender. This must, in general, be effected by some distinct and unequivocal act of the corporation, accepted by the government.[5]

(3.) By forfeiture of the corporate franchises, by disuse, or abuse, judicially declared, upon *scire facias* or *quo warranto* brought for that purpose.[6] This is the only mode in which a *forfeiture of

[5] Town *v.* Bank of River Raisin, 2 Doug. (Mich.) 530; McMahan *v.* Morrison, 16 Ind. 172; 2 Kent's Comm. 312, and notes. A railway corporation is not dissolved by the sale of a part, or all of its road, upon execution. State *v.* Rives, 5 Iredell, 297, 309. See Commonwealth *v.* Tenth Mass. Turnpike Co., 5 Cush. 509. State *v.* Bank of Maryland, 6 Gill & J. 205; De Ruyter *v.* St. Peter's Ch., 3 Comst. 238; Bruffett *v.* Great Western Railw., 25 Ill. 353.

[6] Angell & Ames, § 774. The Eastern Archipelago Co. *v.* Reginam, 2 El. & Bl. 857; s. c. 22 Eng. L. & Eq. 328, in Exchq. Ch.; s. c. in Q. B. 1 El. & Bl. 310; 18 Eng. L. & Eq. 167; *Ante*, § 204. A corporation cannot, except with the consent of the legislature, alienate its property (as where all the stock in one railway is subscribed by another railway, which has the entire control of the first corporation), and which thus relinquishes the control and management of its affairs, so as to divest itself of further responsibility. York & Maryland Line Railw. *v.* Winans, 17 How. (U. S.) 30.

In Baltimore *v.* Connellsville and Southern Penn. Railw., Legal Intelligencer, Sept. 28, 1866, the court thus define the expressions misuse or abuse of corporate franchises. "There can be no abuse or misuse without a positive act of malfeasance. This, to furnish ground of forfeiture, must be wilful. It must be something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power." — "There is nothing profound or mystical about these terms, misuse or abuse. They are not terms of art in the law. The popular sense in which they are used every day is well known. To abuse is compounded of *ab* and *utor;* and in strictness it signifies to injure, diminish in value, or wear away by improperly using." — "Misuse is a still simpler word. It signifies simply to use amiss. But I admit that these words, like all others, may have different meanings when spoken with reference to different subjects. Acts which would be an abuse of one thing, may be no abuse of another. We are, therefore, to ascertain what is 'abuse or misuse' of the corporate privileges by the company. Abuse includes misuse. We may take them both together, and define them thus: Any positive act in violation of the charter, and in derogation of public right, wilfully done, or caused to be done, by those appointed to manage the general concerns of the corporation."

In People *v.* Albany, &c. Railw., 24 N. Y. 261, it is held that a railway corporation, chartered to operate a railway between A. & B., cannot legally operate it between A. & C. only, C. being a way station between A. & B., and abandon that part of the route laying between B. & C.; and if it does so, its charter may be vacated, or its corporate existence annulled by proper proceedings, though a suit in equity, to compel maintenance and operation over the

corporate franchises can be determined, and such question cannot be collaterally raised in suits instituted by the corporation, as the state may waive any forfeiture committed by the corporation.[7]

2. The rights of creditors against the corporation will depend upon the charter, and the general statutes in force at the time of its creation and dissolution.[8] But there is no responsibility of the shareholders beyond the amount of their subscriptions, in the *absence of special liability imposed, either by the charter, or the general laws of the state in force at the time of the incorporation.[9]

3. The rights of shareholders will be to a proportion of the assets of the company, where it had already gone into operation, and the managers and directors were guilty of no fraud, either in

whole track, cannot be maintained. And the legislature cannot declare the charter of a corporation forfeited. This power belongs only to the courts. Bruffett *v.* Great Western Railw., 25 Ill. 353.

[7] State *v.* Fourth N. H. Turnpike Co., 15 N. H. 162; Young *v.* Harrison, 6 Ga. 130; Bank *v.* Trimble, 6 B. Mon. 599; Johnson *v.* Bentley, 16 Ohio, 97; 16 S. & R. 140; Union Branch Railw. *v.* E. Tenn. & Ga. R. 14 Ga. 327; Illinois Central Railw. *v.* Rucker, 14 Ill. 353; People *v.* Bank of Pontiac, 12 Mich. 527; 5 Johns. Ch. 366; 19 Johns. 456. But a charter may be made dependent upon the performance of conditions precedent, in such a form, as that non-performance will work a forfeiture. Parmelee *v.* Oswego & S. Railw., 7 Barb. 599. See also R. M. Charlton, 250; Wilmans *v.* Bank of Illinois, 1 Gilm. 667; Enfield Toll-bridge Co. *v.* Conn. River Railw., 7 Conn. 28; 23 Wendell, 222; 11 Ala. 472; Brookville & G. Turnpike Co. *v.* McCarty, 8 Ind. 392. *Ante*, § 18.

After the forfeiture judicially determined, the company can do no act, unless its power and capacity for that purpose are continued by statute. Saltmarsh *v.* Planters' and Merchants' Bank of Mobile, 17 Alabama, 761. See also Attorney-General *v.* Petersburg & Roanoke Railw., 6 Iredell, 456, where the state is held bound by an implied waiver of forfeiture of corporate charters. But see People *v.* Bank of Pontiac, 12 Michigan, 412.

In a very late case in New York, it is held that if there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers or of the statute authorizing the formation of corporations under general or special laws, the question is one of law, and it is for the state alone to take steps to dissolve such corporation, or forbid the exercise by it of corporate rights and franchises. The courts of equity will not take cognizance of such questions in regard to corporations. Doyle *v.* Peerless Petroleum Co., 44 Barb. 239. The same doctrine is maintained in Sturges *v.* Knapp, 31 Vt. 1.

[8] See Blake *v.* Concord & Portsmouth Railw., 39 N. H. 435. It is here held under a statute provision, that suits may be brought by or against a corporation within three years after its dissolution, that no repeal of the charter of a corporation can take away or impair the remedy of a creditor against it for previously incurred liability, or affect a pending suit against it.

[9] *Post*, § 244. And see Hoffman *v.* Van Nostrand, 42 Barb. 174.

the management or closing up of the concerns of the company. But where a scheme is set on foot, and a prospectus issued, stating that all money deposited will be laid out at interest, and after some subscriptions had been paid to the directors, who had the management of the concern, but before any money was laid out the directors resolved to abandon the concern, it was held, that each subscriber might recover the whole sum paid in by him, of the directors, in an action for money had and received, without the deduction of any part towards the expense of the concern.[10]

4. And where the company goes into operation without the subscription of the full number of shares limited in the charter, it is an irregularity, and may become a fraud in those who consent, but it will not render those shareholders liable upon the contracts of the directors, who do not assent to the company thus going into operation.[11] So, too, where the party is induced * to pay his

[10] Nockels *v.* Crosby, 3 B. & Cresswell, 814; Walstab *v.* Spottiswoode, 15 M. & W. 501; s. c., 4 Railw. C. 321. In this case the prospectus promised to issue scrip, on demand, for the full sum deposited, but that was refused, and the party was held entitled to recover the full sum deposited. Ashpitel *v.* Sercombe, 5 Exch. 147; Chaplin *v.* Clarke, 4 Exch. 403.

[11] Pitchford *v.* Davis, 5 M. & W. 2; Fox *v.* Clifton, 6 Bing. 776; Bourne *v.* Freeth, 9 B. & Cress. 632.

In a case in Georgia, Sisson *v.* Matthews, 20 Ga. 848, s. c. 17 Ga. 544, it was attempted to charge the members of a manufacturing corporation, in equity, upon the ground that the defendants were originally carrying on the same business, as a copartnership, and obtained the act of incorporation, and transferred the business and responsibility to the corporation, with a view unjustly and fraudulently to exonerate themselves, save their former losses, and thereby impose a corresponding loss upon the creditors of the corporation, who gave credit to it, subsequent to its incorporation, upon the ground that, in the petition to the legislature for the act of incorporation, the defendants represented the foundry of the copartnership as being in actual operation at the time of the petition being preferred, when in fact it required $2,000 to be raised upon the credit of the corporation to put it in operation, which they subsequently had to refund; and also that the corporation, after the act, paid $4,000 of the debts of the former company, thus reducing their available means $6,000 below what was represented in the petition to the legislature, upon which the plaintiffs relied, as truth, and were thereby induced to give credit to the corporation, and which they now sought to enforce, to the extent of the $6,000, against the defendants.

The court held that there was no such sequence between the representation to the legislature and the credit given to the corporation as to form the basis of obtaining a false credit; the act of incorporation not having annexed any conditions to the charter, it was not competent to qualify the liability of the corporators by going behind the act of incorporation.

money and execute the subscribers' deed, under a false representation by the defendants, the managing directors, and the scheme is finally abandoned, the plaintiff is entitled to recover his whole money, as upon a failure of consideration.[12]

5. But where the amount of the capital to be raised is stated in the prospectus as *not exceeding* £700,000, and the sum actually subscribed is less, the subscribers are not excused from paying their proportion of the expenses on that account.[13] And the managing committee, who subscribe for shares and pay deposits in order to comply with the standing orders of the House of Commons, will not be allowed to treat this as a loan to the company, as this would be an express fraud upon parliament, but they are liable the same as other subscribers.[14] But where no fraud is shown to induce the plaintiff to sign the parliamentary contract, and subscribers' agreement, he cannot recover his deposit as money had and received, or any portion of it, although the scheme had proved abortive, the contract subscribed giving * the managers power to expend the money in carrying forward the undertaking in the mode they did, and they having expended it in that manner.[15]

6. And the party having made his application for shares in such an undertaking, and paid his deposit and received scrip certificates in the usual form, stating that the parliamentary contract and subscribers' agreement had been subscribed by the person to whom the certificate was issued, is bound by such contract and agreement, the same as if he had subscribed them.[16]

The court seemed to concede in the opinion, that if the defendants had induced the credit, by a substantial misrepresentation, in regard to the funds or liabilities of the corporation, made directly to the plaintiffs for that purpose, and with that intent, they might be made liable, in this form, to indemnify the plaintiffs against the loss which they sustained by such false representation.

[12] Wontner *v.* Shairp, 4 C. B. 404; Jarrett *v.* Kennedy, 6 C. B. 319. And a shareholder who is liable to contribute to the expenses of a collapsed company, and who is also a creditor of the concern, cannot set off his debt against the call upon his shares, but must first pay calls, and then share with other creditors in the avails. Grissell's case, 12 Jur. N. S. 720.

[13] Watts *v.* Salter, 10 C. B. 477. See *ante*, § 2 and notes.

[14] Clements *v.* Bowes, 1 Drew. 184; 21 Eng. L. & Eq. 471; s. c. 8 Eng. L. & Eq. 238; Upfill's case, 14 Jur. 843; s. c. 1 Eng. L. & Eq. 13.

[15] Garwood *v.* Ede, 1 Exch, 264; Atkinson *v.* Pocock, id. 796; Jones *v.* Harrison, 2 id. 52; Willey *v.* Parratt, 3 id. 211.

[16] Clements *v.* Todd, 1 Exch. 268; Carrick's case, 1 Sim. N. S. 505; s. c. 5 Eng. L. & Eq. 114. But he is not a contributory for expenses, unless he authorizes

7. And it was held, that the fact that the plaintiff is not informed that deposits had not been paid upon all shares allotted, at the time the plaintiff subscribed for shares, is no such fraud as will exonerate him from his obligation.[17]

8. By the deed of settlement of a joint-stock company no shares could be transferred without the consent of the directors; the company being unprosperous, and getting into serious disputes, the shareholders agreed to pay a sum to the directors, in full discharge of their liabilities, which was accepted, and transfers made accordingly, and the shareholders retired. The company being ordered to be wound up, it was held that the retiring shareholders were still liable as contributories.[18]

9. An insolvent corporation cannot give away its effects, to the prejudice of its creditors; and any arrangement between the company and the shareholders, to enable them to escape from their just liabilities to the company, to the prejudice of their creditors, will be void, both in equity and at law.[19] But this will not preclude the company from allowing legal or equitable set-offs, upon debts due them.[19]

10. Where the legislature, either in granting a charter to a company, or by the general laws of the state, have a right * reserved to repeal the charter, and the right is accordingly exercised, courts will *prima facie* presume in favor of the regularity of the act.[20]

11. Shareholders cannot exonerate themselves from their statutory liability, either for the debts of the company or expenses incurred by a transfer of their shares to irresponsible persons.[21] But a *bona fide* forfeiture of shares, whether confirmed by the company or not, if acquiesced in by the share-owner and the company,

them. Ib. Sunken Vessels Recovery Company *in re*, Wood's case, 3 De G. & J. 85; s. c. 5 Jur. N. S. 1377; New B. & Canada Railw. & Land Co. *v.* Muggeridge, 4 H. & N. 580; s. c. 5 Jur. N. S. 1131.

[17] Vane *v.* Cobbold, 1 Exch. 798.

[18] Bennett, *ex parte*, 18 Beav. 339; s. c. 5 De G., M. & G. 284; 27 Eng. L. & Eq. 272. [19] Goodwin *v.* McGehee, 15 Alabama, 232.

[20] State *v.* Curran, 7 Eng. (Ark.) 321. But to make the surrender of a corporate charter effectual, it is necessary that it be accepted by the government, and that this appear of record. Norris *v.* Smithville, 1 Swan (Tenn.), 164. The repeal of a charter vests the public work in the state, to be managed by them, or regranted, at their election. Erie & Northeast Railway *v.* Casey, 26 Penn. St. 287.

[21] Lund, *ex parte, in re* Mexican & S. Am. Co., 27 Beav. 465; s. c. 5 Jur. N. S. 400.

will release such owner from all responsibility thereafter accruing.[22] But even when the company declare a forfeiture of shares it will not have the effect to exonerate the holder, if done without any legal warrant for the act.[23]

12. But where the transfer is made for the purpose of enabling the transferee to become a director, or for any other *bona fide* purpose, and not merely to evade the statutory responsibility, it will be regarded as valid and not impeachable in equity.[24] And even when sold at a nominal price, and because the vendor anticipated a disastrous result in the affairs of the company, if *bona fide*, and no trust exists in behalf of the vendor, it will be regarded as valid.[25]

13. Where one is induced to take shares from the company, in consequence of the misrepresentations of the directors and agents of the company, the membership is not in general regarded as binding upon the purchaser.[26] But where a party is thereby induced to purchase shares of third parties, his membership is valid.[26] So, also, if the first purchaser had conveyed the * shares to a *bona fide* purchaser.[27] But where one is induced to buy shares of the company by the fraudulent representation of a stranger, the membership is valid.[28]

SECTION II.

Levy upon Property of Company.

1. *Where charter creates lien, it is paramount to all others.*
2. *Road, or tolls, not subject to levy of execution.*

§ 243. 1. Where the statute of the state provided that the state shall subscribe for half the stock in all incorporated railway and turnpike companies, and have a lien upon the property of the company to the extent of the money advanced by the state, as a cor-

[22] Home Life Ass. Co. *in re, ex parte* Wollaston, 4 De G. & J. 437; s. c. 5 Jur. N. S. 853.

[23] Barton, *ex parte*, 5 Jur. N. S. 420; s. c. 4 Drew. 435.

[24] London & Comity Assurance Co. *in re, ex parte*, Jessup, 2 De G. & J. 638; s. c. 5 Jur. N. S. 1; Bigge, *ex parte*, 5 Jur. N. S. 7.

[25] De Pass, *ex parte*, 5 Jur. N. S. 1191.

[26] Liverpool Borough Bank *in re*, 26 Beavan, 268.

[27] Worth, *ex parte*, 4 Drew., 529; s. c. 5 Jur. N. S. 504.

[28] Ayres, *ex parte*, 25 Beavan, 513.

porator, to secure the payment of the other half of the stock by individual subscribers, it was held that the property of such corporation was not liable on *fi. fa.* for its debts till the lien of the state was extinguished by the payment of the stock.[1]

2. It has been held that creditors cannot levy their executions upon a turnpike road,[2] and the same rule will necessarily apply to railways. And it has been determined that a judgment lien, which attaches only to estates in land, does not bind tolls collected after the rendition of the judgment.[3]

SECTION III.

Execution against Shareholders.

1. *Mode of obtaining execution under English statute.*
2. *Remedy, in this country, by distinct action, more commonly.*
3. *May proceed in equity.*
4. *Payments in land valid.*
5. *How stockholders may transfer personal liability.*
6. *Corporation cannot protect their property from the levy of an execution for the protection of a mortgagee, who himself does not appear.*

§ 244. 1. By the thirty-sixth section of the English Companies' Clauses Consolidation Act of 1845, it is provided, that if execution shall have issued against the company and proved unproductive, it may issue against any shareholder to the extent of his shares remaining unpaid. This execution not to issue except upon the order of the court. It is a general rule that where a party out of the record is made subject to execution, the proper mode of procedure is by *scire facias*.[1] It seems that something more must be

[1] State *v.* Lagrange & Memphis Railway, 4 Humph. 488.

[2] Ammant *v.* The New Alexandria and Pittsburg Turnpike, 13 Serg. & R. 210. Other real estate of the company may be levied upon, but if it be joined in one levy with the road, the whole levy is void. But in a subsequent case it was held, that the toll-house of a turnpike company was so far an integral part of the franchise and a necessary incident, that it was not liable to the levy of an execution by the creditors of the company. Susquehanna Canal Co. *v.* Bonham, 9 Watts & Serg. 27.

[3] Leedom *v.* Plymouth Railway, 5 Watts & Serg. 265; s. c. 2 American Railw. C. 232.

[1] Cross *v.* Law, 6 M. & W. 217; Ransford *v.* Bosanquet, 12 Ad. & Ellis, 813. This is a decision, in the Exchequer Chamber, where the award of execution in the King's Bench is reversed, on the ground that it should be by *scire facias*, but not upon suggestion, or motion, merely. A similar decision is made, ten years

shown than the mere return of *nulla bona*, as to the company. *Bona fide* and substantial efforts must be first used to obtain payment of the company.[2]

The *scire facias* must state that the party is a shareholder, and the amount unpaid, and that execution has issued against the company, and been found unavailing, all which is traversable.[3]

later, in 1850, in Hitchins *v.* The Kilkenny & G. S. & W. Railway, 10 Com. B. 160; 1 Eng. L. & Eq. 357. The court will not grant a *scire facias* against a party, as a shareholder in a company, upon a judgment obtained against the company, unless the affidavits show reasonable grounds for believing that the party sought to be charged is a shareholder. Edwards *v.* Kilkenny, &c. Railway, 14 C. B. N. S. 526; Mather *v.* National Assurance Association, *in re* Clark, id. 676. And the fact that one has applied for and received an allotment of shares, and paid a deposit thereon, is not enough. Edwards *v.* Kilkenny, &c. Railw., *supra*.

[2] Eardley *v.* Law, 12 Ad. & El. 802; Hitchins *v.* Kilkenny and G. S. and W. Railway, *supra;* s. c. 15 C. B. 459; 29 Eng. L. & Eq. 341. But where the debtor could not find sufficient property of the company to satisfy his whole execution, he was held entitled to have execution in the first instance against a shareholder. Ilfracombe Railw. *v.* Lord Potimore, Law Rep., 3 C. P. 288.

[3] Devereux *v.* Kilkenny, &c. Railw., 5 Exch. 834; s. c. 1 Eng. L. & Eq. 481. In this case, while the court hold that *scire facias* is the appropriate remedy to obtain execution against a shareholder, *Pollock*, C. B., protests that, in his opinion, a less formal mode, as by suggestion or motion, is equally competent. In Iowa, where an execution against a corporation had been returned "no property found," and thereupon the plaintiff served a notice upon the company in its corporate name, to show cause why the individual property of the members of the corporation should not be made liable; and at the next term of the court a default was taken against the corporation, and the court heard the cause, and found that the judgment against the corporation was recovered; that an execution had been issued, and returned "no property found"; that the corporation was organized in 1851, under the incorporation act of 1847; that each share in the company was fifty dollars; that the debt on which the judgment was recovered was contracted after the company was duly organized, and after the subscription of stock, and that there was no corporate property to satisfy the judgment; and where the court further found the truth of the contents of a schedule which set forth the names of the stockholders, the number of shares subscribed by each, the amount of each subscription, the amount called in, the amount unpaid, and the whole amount of unpaid stock due from each stockholder; and rendered a judgment, that the individual property of the members of the company, to the amount of stock subscribed by each, and not yet paid, be subjected to said judgment, and that execution issue, to be levied on the private property of the members, to the amount of stock subscribed by each, and not yet paid, as found by the court; it was held that the court could not proceed, at that stage of the case, and in that manner, to adjudge who were the stockholders, and in what amount each was liable. Donworth *v.* Colbaugh, 5 Clarke (Iowa), 300.

* It is sometimes said to be discretionary with the court whether to issue execution against a shareholder, even where it is shown that a former one against the company has proved unavailing. But this can only import that the court have a discretion to determine when the party claiming the execution brings himself within the spirit of the statute.[4]

In the case of the Kilkenny & Great Southern and Western Railway Co. in Ireland, which had an office in London, the court of exchequer granted *scire facias* against a director, upon proof of his declaration at a meeting of the body that they had no funds to meet their obligations, in consequence of the shareholders not paying calls, although perfectly able to do so.[5] If in this way a shareholder should be compelled to pay more than is due from him he is to be reimbursed by the company.[5]

It is no defence to the *scire facias* against the shareholder * that he was requested by the plaintiff to become a transferee of shares in the company as the nominee of others and not on his own behalf; and that on the representation of the plaintiff that by so doing he would incur no responsibility whatever in regard to such shares, the defendant was induced to become such transferee for the purpose aforesaid and no other; and that the defendant never had any interest in the shares or in the company, except for those purposes, and never derived any profit therefrom, and that the company never commenced their work, and the scheme was now wholly abandoned. And further, that plaintiff was privy and stood by and consented to all the above facts and occurrences, and suffered, permitted, and induced the defendant to become the transferee of shares upon the representations and expectations thereby created, as above detailed, and is now unjustly and fraudulently seeking to charge the defendant and make him responsible and liable as a shareholder of the company, in violation of his representations and assurances thus before given.[6]

The court here seem to go upon the ground that the defence offered did not show a fraudulent purpose on the part of the plaintiff, but only the expression of an honest opinion. The time at which persons must be shareholders in order to become liable

[4] 1 Bennett's Shelford, 224; Hodges on Railways, 92.

[5] Devereux *v.* Kilkenny, &c. Railway, 5 Exch. 834; s. c. 1 Eng. L. & Eq. 481; Walford, 236.

[6] Bill *v.* Richards, 2 Hurls. & N. 311.

* 628, 629

for the debts of the company is the date of the return of *nulla bona*.[7]

And by the English statutes, if the inspection of the register of shareholders is withheld from any creditor, he may file an affidavit stating that fact and the best knowledge he can obtain of who are the shareholders, and this unanswered will be sufficient to entitle him to execution against the persons named as shareholders in the affidavit.[8] Or he may proceed by mandamus to compel the production of the register.[9] And it will not deprive the party of his remedy against the shareholders that he first issued an *elegit* against the lands of the company, which * proved unproductive,[9] or that there are funds belonging to the company in the hands of the official manager of the company under the winding-up acts.[10]

And in reply to the *scire facias* the shareholder may show that the judgment was collusive or void, as against the company, or that it grew out of the employment of counsel in a matter *ultra vires* as to the corporation.[11]

2. In this country, by statute often, the shareholders are made liable for the debts of the corporation, in default of payment by it, after judgment recovered. Under these statutes, a distinct action is to be brought against the company. But the shareholders are generally regarded as so far privy to the judgment against the company as to be concluded by it.[12] And in * such action the

[7] Nixon *v.* Brownlow, 3 H. & N. 686. As to the mode of procedure in such cases, under the English statutes, see Ilfracombe Railw. *v.* Devon & Somerset Railw., Law Rep. 2 C. P. 15; Kernaghan *v.* Dublin T. C. Railw., L. R. 3 Q. B. 47.

[8] Rastwick *v.* Derbyshire, Staf., & Worcestershire Railway, 9 Exch. 149; s. c. 24 Eng. L. & Eq. 405.

[9] Reg. *v.* Derbyshire, Staffordshire, & Worcestershire J. Railway, 3 El. & Bl. 784; s. c. 26 Eng. L. & Eq. 101.

[10] McKenyon *v.* Shannon Railw. Co., 4 El. & Bl. 119.

[11] Shedden *v.* Patrick, 1 McQueen's H. L. Cas. 535; Edwards *v.* Railway, 2 Com. Bench N. S. 397. See Scott *v.* Uxbridge & R. Railw., Law Rep. 1 C. P. 596; s. c. 12 Jur. N. S. 602.

[12] Came *v.* Brigham, 39 Maine, 35; Donworth *v.* Colbaugh, 5 Clarke, 300; Cummings *v.* Maxwell, 45 Maine, 190; Milliken *v.* Whitehouse, 49 Maine, 507; New England Bank *v.* Stockholders of N. S. F., 6 R. Island, 154. But it has been held under such statutes, that the shareholders are, in general, liable only for the debts of the corporation, contracted while they were such. Chesley *v.* Pierce, 32 N. H. 388; Moss *v.* Oakley, 2 Hill, 265; Moss *v.* McCullough, 5 Hill, 131. And in Shaler & Hall Quarry Co. *v.* Bliss, 27 N. Y. 297, it was held that the statute liability of a trustee of a manufacturing company, who was in

organization of the company is sufficiently shown by proof of the charter, and the transaction of the proper business under it, for which it was created.[12]

office when default was made in publishing the required annual report, is limited to debts incurred while he remains such trustee, and does not include a debt contracted after he ceased to hold that office, though while the default continued. But see Curtis *v.* Harlow, 12 Met. 3; Southmayd *v.* Russ, 3 Conn. 52; 5 Conn. 28; 10 Conn. 409, where it seems to be considered that the suit may be maintained against all who are shareholders, at the time the suit is brought. And though others may have a lien upon, or equitably own stock in a corporation, the legal liability for debts of the corporation rests upon him in whose name the stock is registered. Richardson *v.* Abendroth, 43 Barb. 162. See Fuld *v.* Cooke, 16 La. Ann. 153. In Conant *v.* Van Schaick, 24 Barb. 87, and three other cases, decided upon the same argument, it was held, that where the statute made the corporators liable for the debts of the company of a certain description, but required the creditor first to pursue his claim to judgment against the company, it entered into the essence of every credit given to the company, and was a part of the contract by which the debt was incurred, that the corporators should be held liable, as general partners.

And where the statute in such case provided, that the amount of the recovery against the corporator should be the amount of the execution, issued upon the judgment recovered against the company, it was held incumbent upon the creditor to show, independent of the judgment, that his claim was of the class for which the statute gave a remedy against the company, and that the amount due on the execution was the rule of damages. Ib.

The statute in this case provided, that the "stockholders shall be jointly and severally liable for all debts due or owing to any of its laborers and servants, for services performed for such corporation." It was held, that an action lay in favor of all persons employed in the service of the company, whether as engineers, master mechanics, or conductors, who do not come under the distinctive appellation of *officers* or *agents* of the company; and a servant who employed and paid men to work with him, might recover the same, as if he had performed the service himself. Ib. The court profess to decide the case upon the authority of Corning *v.* McCullough, 1 Comst. 47. And in Richardson *v.* Abendroth, 43 Barb. 162, it was held that the servant of a manufacturing corporation, in performing the duties incident to his office, is a servant of the company, within the meaning and intent of the statute. See also 7 Barb. 279. But in a later case in New York, Strong *v.* Wheaton, 38 Barb. 616, it was decided that the stockholders are not bound by the acts or declarations of the foreman of the company, he not being in any respect their agent, and that a judgment recovered against the corporation by an employee is not even *prima facie* evidence of the amount due from the company, in a subsequent action against a stockholder. The plaintiff must in such action prove the existence of the corporation, the fact that defendant is a stockholder, the recovery of judgment against the company, the issuing of execution and the return of the same unsatisfied to some extent, and the performance of the service for which he seeks to charge the defendant. And it is here held, that notwithstanding the statute allowing all or any party to be sued in the same action who are liable on the

* 3. Where the statute makes the stockholders liable jointly and severally to the amount of their stock, for the debts of the company, and provides that where any creditor's debt has been refused payment, on proper presentment, he might sue any one or more of the stockholders, it was held that a creditor might, under the New York Revised Statutes, file his bill in equity against the company and such stockholders as were known to him, to charge them with the payment of the debt, and might pray a discovery of the names and residences and amount of stock of the other shareholders, with a view to charge them also.[13]

"same obligation," that an action cannot be maintained against two stockholders without joining all, upon the ground that the word obligation only extends to written contracts and will not embrace actions for work and labor. A consulting engineer is not a "laborer" within the meaning of the statute making stockholders liable for debts due from the company to their "laborers and operatives." Smithson *v.* Brown, 38 Barb. 390. It must appear that the claim is for the services of a laborer or servant of the company, and a contractor does not come within the meaning of the statutes. Boutwell *v.* Townsend, 37 Barb. 205. The personal liability of the stockholders of an insolvent corporation is several, not joint, and the admissions of one defendant are not admissible against another. Simmons *v.* Sisson, 26 N. Y. 264. And qualifications of this remedy against the shareholders are held not to impair the obligation of the contract. Smith *v.* Furman, 25 N. Y. 214. In Donworth *v.* Colbaugh, 5 Clarke, 300, it was held that the repeal of a general incorporation law, neither destroys the existence of corporations organized under such law, nor changes the liability of stockholders in such corporations, incurred under the provisions of such law. But in Hawthorne *v.* Calef, 2 Wallace (U. S.), 10, it was held that a state statute, repealing a former statute, which made the stock of stockholders or an incorporated company liable to the corporate debts, is as respects creditors of the company at the time of such repeal, a law impairing the obligation of contracts, and void.

It was held in Louisiana, that where a majority of the stockholders of a Company have the right to order the winding-up and liquidation of the affairs of the company, and a majority of them sign an obligation to pay their proportion of the outstanding corporate debts, they cannot be released from their obligation on the ground that it was not binding on any stockholders until all had signed. Green *v.* Relf, 14 La. Ann. 828.

[13] Bogardus *v.* Rosendale Man. Co. & others, 3 Selden, 147. See also Morgan *v.* N. Y. &. Albany Railway, 10 Paige, 290. And see Cleveland *v.* Marine Bank, 17 Wisconsin, 545. But in New York, after the appointment of a receiver to take charge of the effects of an insolvent railway corporation, under the general railway act of New York, all remedies against the corporation being expressly suspended, this extends, by implication, to actions against the stockholders to enforce the debts of the company. Rankine *v.* Elliott, 16 N. Y. 377. And in Cummings *v.* Maxwell, 45 Maine, 190, it was held that the remedy which creditors of a corporation have against the individual members for

* 4. In Pennsylvania,[14] under a statute making the shareholders liable to the creditors to the amount of their unpaid subscriptions,

corporate debts exists by statute only; and the legislature may change or restrict it upon pre-existing as well as upon subsequent contracts. And in New Hampshire, since the passage of chapter 1962, pamphlet laws, no action at law can be maintained against any individual stockholder in a railway corporation, for a debt of the corporation, even though demand has been legally made upon such corporation, and proper notice given to such individual stockholder. And where there were other stockholders at the time the debt was contracted, a bill in chancery cannot be maintained against such individual stockholder alone for a debt of the corporation, but those against whom such stockholder would have a remedy over for contribution must be made parties with him. Hadley *v.* Russell, 40 New Hampshire, 109. But in Rhode Island it was held, under statutory provisions making the stockholders liable for unsatisfied corporate debts as copartners, that payment of the whole debt might in the first instance be exacted at law from any living stockholder, or in equity from the estate of any deceased, and that the person or estate thus paying the debt should be left to his remedy over by himself; but living stockholders, and the representatives of those deceased liable to the debt, must be made parties defendant to the bill seeking such remedy against the estate of a deceased stockholder; and if his real assets are sought to be charged, his heirs-at-law must also be made parties, in case of intestacy, and his devisees if there be a will; and the same creditor cannot enforce in the same bill against the estates of deceased stockholders different debts, for which all the estates pursued are not liable, but he may in the same bill seek relief out of the estates of two or more stockholders, all of them being liable to his debt. New England Commercial Bank *v.* Stockholders of N. S. F., 6 Rhode Island, 154.

And under the New York statutes, one stockholder of a corporation cannot maintain an action against his fellow-stockholders to enforce a personal liability for a debt of the company. Richardson *v.* Abendroth, 43 Barb. 162. The construction of the statute of Maine on this point is discussed in Ingalls *v.* Cole, 47 Maine, 530; Coffin *v.* Rich, 45 Maine, 507. And the statutes of one state, making personal liability for corporate debts a penalty for breaches of the duties imposed upon the officers of corporations, cannot be enforced in another state. Derrickson *v.* Smith, 3 Dutcher, 166. The stockholders of a corporation formed in New Jersey, under the laws of New York, are considered in the former state to be individually responsible for corporate debts as partners. Hill *v.* Beach, 1 Beasley, 31. In Mathews *v.* Albert, 24 Md. 527, where the statute made the stockholders in corporations severally liable to the creditors, to an amount equal to their stock, for all debts incurred by the company before the capital was paid

[14] See Patterson *v.* Wyomissing Manufacturing Co., 40 Penn. St. 117; Megargee *v.* Wakefield Manufacturing Company, 48 Penn. St. 442; Gunkle's Appeal, 48 Penn. St. 13; Patterson *v.* Arnold, 45 Penn. St. 410; Hoard *v.* Wilcox, 47 Penn. St. 51. The individual members cannot set up their own faults or mistakes of organization as a defence against creditors. McHose *v.* Wheeler, 45 Penn. St. 32. See Allibone *v.* Hager, 46 id. 48.

it was held that payment in lands conveyed to the company, which were necessary, and authorized for the enjoyment of its franchises, would discharge the liability, and that they would not be affected by after discovered error in the judgment of the company as to the value of the lands.[15] And the consent of such * stockholder, by being present and acting as director at a meeting when the directors nullified such payments in land, but gave the subscribers a right to surrender their certificates issued thereon, and take new certificates for the amount of money paid by them, does not render him liable if he offer to surrender his certificate and take one for his money payments only.[15]

5. Where the general statutes of the state, or the special act of the company, render the stockholders personally liable for the debts of the corporation, they remain holden, notwithstanding the transfer of their stock after the debt accrued, until all the requirements of the act for their release have been strictly complied with. And if the act allows creditors to take certain proceeding, by way of notice to stockholders, to prevent their release from liability, by the transfer of their stock, and such proceeding has been taken, the liability will continue.[16]

in; upon a bill brought in equity against certain shareholders who had not paid in full, it was held they could not set off loans by them to the company, in defence of this claim. But where the corporation is established in New Hampshire, where, by law, the stockholders are made personally responsible for its debts, by reason of the failure to pay in the whole amount of the capital stock, a creditor cannot maintain a bill in equity in Massachusetts to enforce his claim against the stockholders, although some of them reside there, and the bill is alleged to be brought in behalf of all the creditors. Erickson *v.* Nesmith, 4 Allen, 233. The plaintiff is proceeding against stockholders for the debts of the company, on the ground of some default of the corporation in complying with the statutory requirements, and it is not incumbent upon the defendants in their answer, to make any specific denial of the failure of the corporation to comply with the statutes: the plaintiff must prove that as part of his own case. Hutchins *v.* New England Coal Mining Co., 4 Allen, 580.

[15] Carr *v.* LeFevre, 27 Penn. St. 413. In Indiana, where the directors of the corporation alone are authorized to receive real estate, if they are not elected until after the subscriptions to preliminary articles are complete, it would seem that real estate subscriptions cannot be taken upon such articles. State *v.* Bailey, 16 Ind. 46. But the court intimate that the directors, when in power, might have the right to receive, in good faith, payment of any subscription in real estate, if it appeared to be for the interest of the corporation to receive such payment in the given case. Ib.

[16] Force *v.* Tanning & Leather Company, 22 Ga. 86. See also Robinson *v.*

6. The corporation cannot shield its property from attachment or levy of execution upon the ground of the state or any other mortgagee having a prior lien upon it.[17] The mortgagee must assert his own claim, and it cannot be urged by the mortgagor on his behalf unless by his express procurement.[18] The judgment against the corporation may be evidence against a shareholder, who is made responsible in default of the company, to show, *prima facie*, such default by judgment, execution, and return of *nulla bona*.[19]

SECTION IV.

Assignments by Railways, in contemplation of Insolvency.

§ 245. General assignment of property by business corporations, for the benefit of creditors, giving preferences among them, but providing for the payment of all their debts before any * return to the company, have been held valid.[1] But such an assignment by a railway company was held void under the insolvent laws of New York.[2]

Beall, 26 Ga. 17. And a shareholder who has been compelled to pay the debts of the corporation subsequently to proceeding in insolvency, cannot avail himself of such payment in defence of an action against him by the assignee of the corporation to recover a debt due from him to the corporation. Howe *v.* Snow, 3 Allen, 111.

[17] Patterson *v.* Wyomissing Manufacturing Co., 40 Penn. St. 117.

[18] Boyd *v.* Chesapeake & Ohio Canal Co., 17 Md. 195.

[19] Hudson *v.* Carman, 41 Me. 84. But such judgment would not be evidence against a shareholder whose liability was concurrent with that of the company.

[1] Warner *v.* Mower, 11 Vt. 385; Whitwell *v.* Warner, 20 Vt. 444, 445; Angell on Corp. § 191, and notes; 3 Wend. 13; 3 Barb. Ch. 119; 16 Barb.280; 21 id. 221.

[2] Bowen *v.* Lease, 5 Hill, 221. But where no preferences are made, it is valid; but the franchise of the corporation does not pass. Hurlburt *v.* Carter, 21 Barb. 221. See also Fellows *v.* Commercial & Railway Bank of Vicksburg, 6 Rob. (Louis.) 246; De Ruyter *v.* St. Peter's Church, 3 Comst. 238. But see Loring *v.* United States Vulcanized Gutta Percha Co., 36 Barb. 529. This subject is very extensively discussed in the case of Curtis *v.* Leavitt, 15 N. Y. 9, in regard to the North American Trust & Banking Co. Most of the points ruled are more or less affected by statutory provisions. But some may be of general interest.

It was held that a pledge of most of the assets of the company, when it was in fact insolvent, and known by the officers making the pledge to be deeply

embarrassed, if done by them in good faith, and with the honest expectation of continuing the business of the company and paying its debts, is valid, it not being done to prefer any of its creditors, in contravention of the provisions of the statute, but to enable the company to borrow money.

Where the statute prohibits the officers of moneyed corporations from conveying any of its effects, except in pursuance of a resolution of the board of directors, this does not hinder the corporation itself from directing or ratifying a conveyance, in any mode it may deem proper.

The duties of receivers of insolvent corporations under the New York statute, in winding up the concerns of such corporations are discussed here at length. It is held that the receivers represent and are subject to the disabilities of the corporation.

But a receiver cannot be appointed to take charge of the effects of a corporation unless upon a bill to which the company is a party or consenting by formal appearance in court. Gravenstene's Appeal, 49 Penn. St. 310. See Sands *v.* Boutwell, 26 N. Y. 233; Dayton *v.* Borst, 4 Bosworth, 115, where the conclusiveness of an adjudication of the insolvency of a corporation, made without notice to any officer of the corporation, is discussed, and under the circumstances of the case maintained. See Nichols *v.* Perry Patent Arm Company, 3 Stockt. Ch. 126.

In Louisiana, a corporation, created under the act for the organization of corporations for works of public improvement and utility, cannot avail itself of the provisions of the act relative to the involuntary surrender of property. Jeffries *v.* Belleville Iron Works Co., 15 La. Ann. 19. See Bank Commissioners *v.* Rhode Island Central Bank, 5 R. I. 12. The subject is discussed at length in Murray *v.* Vanderbilt, 39 Barb. 140, in which some of the points decided may be worthy of mention. It is here held that no power can be exercised by the Supreme Court of New York over a foreign corporation, in * proceedings instituted by a stockholder to wind up its affairs; but for the purpose of preserving the property of such corporation, for the benefit of creditors or stockholders, a court of equity has ample power to take charge of it, and appoint a receiver. An appearance of the corporation by officers of the court will be valid and give jurisdiction, whether the service of process upon its officers be good or not, provided the corporation is still in existence. Murray *v.* Vanderbilt, *supra*.

Where the president and secretary of a corporation executed an assignment of its property, and attached the seal of the company thereto, without any specific authority to do so, this was held not a proper execution of the instrument. And that the want of authority on the part of the officers could not be cured by any proof of execution before the commissioner. Ib.

In Pennsylvania it is provided by statute (Act of Assembly, January 21, 1843), that no public internal improvement company shall make an assignment, &c., of its real or personal property, while debts or liabilities to contractors, workmen, or laborers remain unpaid, without first obtaining their written assent. As to the assignment contemplated by this Act, see McBroom & Wood's Appeal, 49 Penn. St. 92.

*CHAPTER XXXVI.

BOARD OF TRADE. — RAILWAY COMMISSIONERS.

SECTION I.

Supervision of Railway Legislation.

*§ 246. It is well known that from the first existence of railways, operated by steam, in England, the Board of Trade, which is a department of the executive government, have (except from 1846 to 1851, when their jurisdiction over railways was transferred to the Railway Commissioners, a distinct board created for that purpose) exercised a very extensive and very important control over the railway management in that country. This at one time extended to the supervision of all applications to parliament for legislation upon that subject, and resulted in the almost entire control of the railway legislation. As stated before, this jurisdiction was conferred upon a distinct board, denominated Railway Commissioners, from 1846 to 1851.[1] But in 1853 the report of the select committee of the House of Commons, upon the subject of railways, recommended that the supervision of railway legislation be referred in future to a permanent standing committee in the House of Commons, who, with the aid always attainable from the executive government, would prove a more satisfactory tribunal for the supervision of this subject than the Board of Trade. This proposition was adopted, and seems to have met with acceptance. The Board of Trade still present, at the beginning of each session of parliament, a comprehensive report upon the general nature of the railway schemes for the year, and detailed reports upon the provisions contained in the several bills, which are required to be furnished the board in advance of the meeting of parliament. A somewhat similar duty is, in many of the American states, performed by Railway

[1] 9 & 10 Vict. c. 105; 14 & 15 Vict. c. 105.

* Commissioners. And such a board, if properly constituted, can scarcely fail to be of very essential service to the legislatures of the several states, whose sessions are short, and whose members are often inexperienced both in the detail of general legislation requisite for the proper management of railways and especially with the devices sometimes resorted to for the purpose of gaining unequal and unjust special legislation in behalf of interested individuals or corporations. But the benefit of such a board must depend chiefly upon its intelligence and independence. Without these it might become an instrument of wrong and injustice, more effective, perhaps, than an ordinary legislative committee.

SECTION II.

Supervision of Railways by Board of Trade and Railway Commissioners.

1. *Proceedings in England, in opening railways.*
2. *Establish rules for connection.*
3. *Connection of branch railways.*
4. *Courts of equity will not interfere with decisions of Railway Commissioners.*
5. *English courts regulate railways for public accommodation.*

6 and n. 8. *Desirableness and efficiency of railway commissioners in this country considered.*

§ 247. 1. In England, no railway or any portion of it can be opened for the public conveyance of passengers, until upon proper notice from the company it has been inspected and approved by the Board of Trade.[1] And if the officer inspecting the proposed railway shall report that it is not in proper condition to be used with perfect safety to the public, the Board of Trade may, from time to time, postpone the opening, not exceeding one month at one time, until it shall appear that such opening may take place without danger to the public.[2] And railways are subjected to severe penalties for opening their roads * without the proper order of the board. For the purpose of enabling the board to perform their duties, they have power at all

[1] 5 & 6 Vict. c. 55; Hodges, 547, 554.

[2] And it is said, that, although the board may have sanctioned the opening of one line of railway, they have authority to prohibit the use of an additional line [track?]. Attorney-General *v.* Oxford & Wolverhampton Railway, 2 Weekly Reporter, p. 330, 1853–4. And the Board of Trade may originate prosecutions for violations of their orders. Hodges, 554.

times to enter upon railways, and examine their works, and the companies' officers are subjected to penalties, for wilfully obstructing an officer of the board in the discharge of such duty.

2. And the board have authority to determine all questions in dispute between different railways, in regard to their connections, so far as such questions relate to the safety or convenience of the public, and to determine by whom the expenses attending the arrangements shall be borne.[3]

3. The Board of Trade have power also to determine in what mode land-owners adjoining railways, having the right to connect branch railways with the main track of an existing railway, shall be allowed to exercise the same consistently with the rights of the company and the safety of the public. And where railways cross highways or turnpikes, private ways or tram-ways, on a level, and the railway is willing to carry such way over or under their railway, by means of a bridge or arch, at their own expense, on the application of the company and hearing the parties, if it shall appear that the level crossing endangers the public safety, and that the proposal of the company does not violate existing rights without adequate compensation, the board may * give the company power to build a bridge or make such other arrangements as the nature of the case shall require.[4]

[3] 5 & 6 Vict. c. 55, §§ 5 & 6 & 11; 3 & 4 Vict. c. 97, §§ 5 & 6; 7 & 8 Vict. c. 85, § 15. And where, by act of parliament, disputes between three different lines of railway, meeting at one point, in regard to the mode they should forward the traffic, coming from each other's lines, are to be settled by arbitration, upon the application of either party, upon fourteen days' notice, the arbitrators to have power to direct all measures necessary for the accomplishing the desired object, it was held to come within the range of the powers of the arbitrators to determine what trains should be run, and the speed at which they should run, and the places of stopping, and that one company should carry the cars and carriages of the others over their own line, and that it was not indispensable that the arbitrators should fix the time for the continuance of their regulations, as either party might compel a new arbitration, at any time, by fourteen days' notice. The Eastern Union Railway *v.* The Eastern Co. Railway, 2 El. & Bl. 530; s. c. 22 Eng. L. & Eq. 225. And a court of equity will interfere between two railways, entitled to the joint use of a station, by prescribing regulations for its management, but such interference ought not to take place without grave occasion. The court may also direct a partition of the station, and appoint a receiver, if necessary. But where provisions exist for the settlement of such disputes by arbitration, the court will withhold its interposition until that remedy has been resorted to.

[4] 5 & 6 Vict. c. 55, § 13; *ante*, § 108.

4. But in a recent case before the Lords Justices, upon appeal, it was held, affirming the decision of *Stuart*, V. C., that the Court of Chancery had no power to review the decision of the Railway Commissioners, whose office was not that of mere arbitrators, but *quasi* judicial.[5]

5. And the courts of equity,[6] or, by the late statutes, all the courts in Westminster Hall, have jurisdiction to determine questions affecting the public accommodation, by means of imperfect railway connections. But they decline to interfere where there is every reasonable accommodation afforded, and there is no general complaint, although a single person claims further facilities by means of different possible arrangements.[7]

6. Our own views in regard to the desirableness and efficiency of Railway Commissioners in this country, are presented somewhat in detail in a report to the legislature of the Commonwealth of Massachusetts, in the year 1865, the substance of which we venture to insert in the note below.[8]

[5] Newry & Enniskillen Railway *v.* The Ulster Railway, 2 Jur. N. S. 60; s. c. 39 Eng. Law & Eq. 553.

[6] 17 & 18 Vict. c. 21.

[7] Barrett *v.* Great Northern & Great Midland Railways, 1 C. B. N. S. 423; 28 Law Times, 254, January, 1857; s. c. 38 Eng. L. & Eq. 218.

[8] We should have been gratified to present some scheme of legislation which would relieve the General Court of the annoyance and burden of examining and disposing of the multiplicity of legislative projects likely to come before them, at every session for some years, in regard to this subject. But none has occurred to us, as at all hopeful, unless it were to be found in a permanent board of railway commissioners, who should assume the general jurisdiction of all disputed questions arising in regard to railway management and operation within the Commonwealth; and to whom all projects for legislative amendment, or extension of the existing law, should first be submitted, and only be liable to come before the General Court upon their favorable report. This was advocated before us by many gentlemen of learning and experience in the matter of railway management, and was opposed by as many others of equal weight; so that we could gain very little aid in that way upon the point. The proposition before us was to recommend a special board of commissioners to have the supervision of street railways alone.

1. This matter is so important that we have ventured to state our views in regard to it somewhat in detail. We supposed that whenever the General Court became convinced that such a general supervision of the interests and management of railway traffic within the Commonwealth had become necessary, it would naturally be extended to the steam roads as well as others, and that the whole matter would probably be committed to one board. We should not, therefore, have felt justified in reporting a bill for the creation of such a board, unless the

*SECTION III.

Returns to be made to the Board of Trade, or Railway Commissioners.

1. *May require companies to return traffic and accidents.*
2. *Third class trains and mail trains.*
3. *Time of completing roads.*

§ 248. 1. The Board of Trade in England have by statute power to require railways to make certain returns to them, upon * subjects

entire subject of railway traffic in the state were embraced in it, and that would carry us beyond the range of our commission. But there can be no question that such a board would be of immense value to the interests of the public, as well as that of the railways, if it could be established upon a proper basis, and suitable talent could be secured for the performance of its duties.

2. This power was for a long time, and is at present, exercised in England by the Board of Trade. From the year 1846 to 1851, the function was committed to a special board called the Railway Commissioners. This board, in whichever form it existed there, has had the general supervision of railway legislation, although these bills are now required to have the approbation of a permanent standing committee of the House of Commons, before being introduced into parliament. This board have also the unlimited control of railway connections; the running and connection of trains; the equalization of the rates of fare and freight; the time and fitness of new lines of railway being opened for traffic, and the connection and operation of branch lines intended for the accommodation of special business near the main routes. The decisions of the board are considered so far in the nature of a final adjudication, that they are not revisable in a court of equity, although they have to be carried into effect by the decrees of that court, whenever obedience to them is not voluntarily rendered. Railway returns are made to this board, and are combined and classified by them, which seems quite indispensable to their being of much use to any one. This board has proved of immense and indispensable importance there, and we see no certain ground to question its being made equally so here, if properly constituted.

3. It would save a great deal of expense and inconvenience to both classes of railways, which at present seem inevitable. It would at the same time relieve the General Court of much embarrassment and delay, which it might not be practicable to save in any other way. We feel, therefore, as before intimated, that we have the most satisfactory grounds for saying, that such an arrangement, when satisfactorily established, could not fail to prove of immense benefit to the public interest as well as that of the railways.

4. There is one function of such a commission in regard to steam railways, which, if it could be effectually performed, would be of inestimable value to the security of railway travel, and which it is not easy to obtain in any other mode; we mean such inspection and supervision of the railway structures and works

* 641, 642

connected with the public interests, such as the aggregate traffic in cattle and goods respectively, and also * in passengers, according

throughout the Commonwealth, as to give proper assurance that they were in a safe condition for use for passenger transportation.

(1.) *The law in this respect* is established upon such a basis that there is no ground of complaint. Common carriers of passengers by steam railways are required to maintain every agency put in requisition, in the course of such transportation, in the most perfect condition, so far as security against injury to life or person is concerned, which any human foresight, wisdom, or skill can effect. The road-bed is to be as complete in every respect as it is possible to make it. So, also, of the superstructure. The rail is to be made of the best iron; in the most approved form, and by the best workmanship. The cars are to be constructed and maintained in the same manner. Every operative, from the highest to the lowest, in any manner connected with passenger transportation, must not only know his whole duty, but he must also perform it in the coolest, most perfect manner, or the company are responsible for the evil consequences. This is indeed a most stringent rule of responsibility; but not more stringent than the value and the peril of the interests at hazard imperiously demand.

(2.) It is obvious, if this high standard of requirement were always maintained, none of those fearful and destructive accidents which so often shock the public mind could occur. And it is well known, that upon the continental railways in Europe, and especially that from St. Petersburg to Moscow, where millions of passengers are transported annually, not a single accident affecting the life or person of passengers has occurred for years, and may reasonably be expected never to occur; while here they are almost of daily occurrence. It is true, no doubt, that the best managed roads in our own country have come to maintain their works in the most perfect manner, out of regard to economy as well as duty, probably; but there are numerous others, where, for many reasons, the case is entirely otherwise; and where the passenger traffic is continued with such defective appliances as to expose the managers of the roads to indictment and conviction for manslaughter, at the very least, where any death is thereby produced. And this is sometimes the case upon the leading thoroughfares in the country.

(3.) It unquestionably becomes the duty of every state to take effective measures to prevent and to correct all such abuses within their own limits. And the fact that no such deplorable tendencies have as yet developed themselves within this state, if such be the fact, is no safe ground to justify any relaxation in regard to the proper safeguards being seasonably applied. For the consequences of such criminal negligence are so fearful, and so irremediable after they occur, that no wise legislature could justify the omission of any reasonable safeguard against their occurrence, when so well assured of the happening of numerous similar accidents in many of the other states within the last few months, which might in all probability have been prevented by the slightest precautions, if only faithfully and seasonably applied.

5. But after having said so much in favor of some efficient supervision of the passenger railway traffic in the Commonwealth, we feel bound further to state, that, in reviewing the railway legislation of the different states, we find that

to the several classes; the accidents occurring attended with personal injury, and in some cases such as are not.

2. The railway companies in England are required to convey passengers by third-class trains, at certain specified rates, and these trains being intended for the public benefit, and to prevent exorbitant demands of fare, are under the control of the board. The speed of mail trains, within certain limits, is under the control of the board.[1]

3. The board have power, too, to extend the time for completing railways, fixed by their special acts, and for the compulsory powers of taking land in certain cases, or to allow the abandonment of railways, or certain parts thereof, which are found not sufficiently remunerative to justify their continued operation.[2]

boards of railway commissioners exist in most of the states where the railway systems are most matured, and we are not informed that it has produced an entirely efficient enforcement of the legal duties of passenger carriers by railway in those states. We greatly fear that it has had no very sensible effect in that direction. Whether this unfortunate result is from some defect inherent in the nature of things under our system of government, and with our free notions in regard to business and the strict enforcement of law, is a broader inquiry than we feel prepared to encounter at this time. There is no doubt some difficulty of that character; more, probably, than it would be easy to make the public mind comprehend; but we believe it is not invincible.

6. There is no question a good deal of it might be obviated by a careful selection of the commission, and by giving ample salaries, and requiring the members to give their whole attention to this one subject, and not be employed in any other office, profession, or pursuit, from which any emolument is derived during their continuance in the office, and by making the commission as entirely separate from all employment or support of the railways as practicable; as much so as the judicial tribunals of the commonwealth are. It would seem entirely practicable, in this mode, to render such a board effective and impartial, and at the same time acceptable to the public, and to the interests under their supervision.

[1] Hodges, 557, 558.

[2] Hodges, 559, 560.

* CHAPTER XXXVII.

LEGISLATIVE SUPERVISION. — POLICE OF RAILWAYS.

SECTION I.

Obligations and Restrictions imposed by Statute.

1. *The benefits, and necessity of legislative control.*
2. *Provisions of English statute, in regard to traffic.*
3. *Control of the gauge. Right of public to use railway.*

§ 249. 1. We have said something upon the subject of the power of the legislature to impose new obligations and restrictions upon existing railways.[1] We now propose to speak briefly upon the subject as applicable to railways generally. Railways being a species of highway, and in practice monopolizing the entire traffic, both of travel and transportation in the country, it is just and necessary, and indispensable to the public security, that a strict legislative control over the subject should be constantly exercised. The difficulty is in knowing how to frame and how to exercise this control.[2]

2. The English statutes, and especially the Railway and Canal Traffic Act of 1854,[3] have attempted a very strict supervision. By section one, the word "*traffic*" is defined to include, not only passengers and their baggage, and goods, animals, and other things, conveyed by a railway or canal company, but also carriages and vehicles of every description, used on such railway or canal. Section two requires such companies to use all people alike in regard to the traffic, to facilitate travel and transportation upon connecting lines to the utmost of their power, * and to give

[1] *Ante*, § 232.

[2] See Great Western Railway *v.* Decatur, 33 Ill. 381; State *v.* Noyes, 47 Me. 189; State *v.* Jersey City, 5 Dutcher, 170; Branson *v.* Philadelphia, 47 Penn. St. 329.

[3] 17 & 18 Vict. c. 31.

every facility to the public, who wish to use such railway or canal. Section three provides that any party claiming to have suffered injury in England, in violation of the act, may make a summary application to the Court of Common Pleas, in Westminster Hall, or any judge of such court, stating in general terms the nature of the grievance, who shall issue process to such company and try the accusation in the most summary mode, and after ascertaining the true state of the facts, by the aid of engineers, barristers, or other fit persons, are to give judgment and carry the same into effect by means of an injunction, mandatory or prohibitory, as the case may be. This remedy is merely cumulative, and does not deprive the party of any redress to which he was entitled before, or in any other mode.

3. The English statutes provide that the gauge of railways shall be uniformly four feet eight inches throughout Great Britain, and five feet three inches in Ireland.[4] The Railways Clauses Consolidation Act provides in detail for the use of railways, by all persons who may choose to put carriages thereon, upon the payment of the tolls demandable, subject to the provisions of the statute[5] and the regulations of the company. The view originally taken of railways in England evidently was to treat them as a common highway, open to all who might choose to put carriages thereon.[6] But in practice it is found necessary for the safety of the traffic, that it should be exclusively under the control of the company, and hence no use is, in fact, made of the railway by others.[7]

[4] 9 & 10 Vict. c. 57.

[5] 5 & 6 Vict. c. 55.

[6] The King *v.* Severn and Wye Railway, 2 B. & Ald. 646, where the Court of King's Bench, by writ of mandamus, compelled a railway company, who were about to take up the rails on their road, to restore them, and to keep the road in a proper state for the public use. The Queen *v.* Grand Junction Railway, 4 Q. B. 18, 38.

[7] Queen *v.* London and S. W. Railway, 1 Q. B. 558.

*SECTION II.

Regulation of the running of Cars or Trains, by Municipal Authority.

1. *May prohibit the use of steam power in streets.*
2. *May do this by virtue of their general control of police.*
3. *Police during construction of railways in England.*
4. *Right of municipalities to make railway grants.*
5. *Disapproval of conditional grant of street railways.*
6. *Municipal authorities cannot give permission to lay rails in the public street.*
7. *Municipal authority may regulate the removal of snow from street railways, by delegation to other officers.*

§ 250. 1. It has been held, that a statute giving power to the common council of a city to regulate the running of cars, within the corporate limits, authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city.[1]

[1] Buffalo and Niagara Falls Railway *v.* The City of Buffalo, 5 Hill (N. Y.), 209. See also Veazie *v.* Mayo, 45 Maine, 560; State *v.* Tupper, Dudley (S. C.), 135. See Branson *v.* Philadelphia, 47 Penn. St. 329. And where a charter was granted to a company to build and use a passenger railway in certain streets of a city, subject to all the ordinances of the council of the said city, the company, by accepting the charters, agreed to obtain the consent of the city council to their work, agreeably to the ordinance of the city. Philadelphia *v.* Lombard & South St. Passenger Railw., 3 Grant's Cases, 403. In Great Western Railw. *v.* Decatur, 33 Ill. 381, an ordinance of the City of Decatur, prohibiting railway companies from allowing their engines, machines, or cars to stand or remain on a travelled railway crossing, used by teams, to the hindrance and detention of the same, was held good, and within the powers of the municipality. In State *v.* Jersey City, 5 Dutcher, 170, it was held, that a power to regulate the speed of trains does not authorize a municipality to declare the running of any locomotive or train of cars in the city at a faster rate than a mile in six minutes, or the stopping of a train of cars upon the track of a railway authorized by law, where the track does not cross a public street or square, a removable nuisance.

By the act of the legislature incorporating the New York & Harlem Railway Company, it was provided that nothing contained therein should authorize the construction of their railway tracks in or along any of the steeets of the city of New York, without the consent of the mayor, &c., who were thereby authorized to grant permission so to construct it or to prohibit its construction, and if constructed to regulate the time and manner of running the same, and the speed with which the carriages might move on it. Thereupon, on the application of the company, an ordinance was adopted by the mayor, &c., permitting the track

* 2. We should entertain no doubt of the right of the municipal authorities of a city or large town, to adopt such an ordinance, without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions.[2] Such must have been the opinion of the court in the case last referred to.[3] *Nelson*, Ch. J., says, "A train of cars, impelled by the force of steam through a populous city, may expose the inhabitants and all who resort thither for business or pleasure to unreasonable perils; so much so, that unless conducted with more than human watchfulness, the running of the cars" [in that mode] "may well be regarded as a public nuisance."[4]

* 3. By general statute, in England, the railway companies are to bear the expense of a reasonable police force, during their con-

to be laid in certain streets, but providing, that if, after its construction, it should, in the opinion of the mayor, &c., constitute an obstruction or impediment to the future regulations of the city, or to the ordinary use of any street or avenue, the company should forthwith provide a satisfactory remedy therefor, or remove the rails; and also expressly reserving to the mayor, &c., the right to prescribe the moving power to be used, and the speed, as well as all other power reserved in the act of incorporation. The ordinance was to have no force until the railway company in writing under seal covenanted to abide by and perform its conditions. An agreement of this nature was executed and filed in the office of the city comptroller, and thereupon the company laid their track on Fourth Avenue and other streets. In 1854, the mayor, &c., prohibited the running of steam-engines or locomotives on the track of the company on part of Fourth Avenue in eighteen months after that time. Held, that this ordinance was valid, and was not a violation of any of the franchises granted to the railway company; that granting permission to lay the track did not deprive the mayor, &c., of the right afterwards to regulate its use by the company; that the agreement of the company was valid as a restriction upon its corporate power, and in no sense a transfer of it; that the corporation can make no valid contract which will interfere with its legislative control over the streets, and any such contract, if made, is revocable at its pleasure. The court here say that a party calling for the use of its equitable powers will not be permitted to found his claim upon a permission in a contract, while he repudiates the conditions upon which that permission was granted. New York & Harlem Railw. *v.* Mayor of New York, 1 Hilton, 562.

[2] But a municipality cannot authorize a private corporation to create a nuisance in the course of its business, so as to exempt such corporation from liability to any citizen whose property has been injured by such nuisance. Gas Co. *v.* Teel, 20 Ind. 131. And, without legislative authority, a municipality cannot forfeit property as a penalty for a breach of an ordinance. Phillips *v.* Allen, 41 Penn. St. 481.

[3] Buffalo & Niagara Falls Railw. *v.* City of Buffalo, 5 Hill (N. Y.), 209.

[4] See also Commonwealth *v.* Old Colony, &c., Railw., 14 Gray, 93.

struction, and as long as workmen are employed in completing any works on or connected with the railway.[5]

4. An important case[6] occurred in the city of New York, in regard to the power of the Common Council to grant the use of the streets to natural persons, having no legislative grant for that purpose for a railway, for the transportation of passengers, by horse-power. The case was an application to the Superior Court for an injunction against the defendants, to restrain them from making the grant. The defendants having in the first instance disregarded the preliminary injunction, and passed the grant, which was accepted in writing by the grantees, the grantees were also made parties defendants.

* "Held, that a grant of the powers, privileges, and immunities conferred by the resolution in question, is the grant of a franchise, and if the municipal corporation of this city was incom-

[5] North British Railway *v.* Horne, 5 Railw. C. 231. In this, and in some other cases, the provision is contained in the special act.

[6] Attorney-General of New York *v.* The Mayor and Aldermen of the City of New York, 3 Duer, 119. The general doctrine of this case, as to the right of the city to make such grants, was affirmed in the Court of Appeals. Davis *v.* Mayor, &c., of New York, 4 Kernan, 506. But in the Court of Appeals it was held that tax-payers and residents, unless owning land on that street and therefore specially injured by the grant, could not take proceedings for vacating it; and that the Attorney-General was improperly joined, and for further reasons the proceedings were in form irregular. It is here declared by *Denio*, Ch. J., that an unauthorized continuous obstruction of a public highway or a street is a public nuisance. But that which is authorized by competent legal authority cannot, in law, constitute a nuisance. See *ante*, § 1, pl. 4 and note. But see Gas Co. *v.* Teel, *supra*.

And in the New York Common Pleas, N. York & Harlem Railw. *v.* Mayor of New York, 1 Hilton, 562, it was held that the only limitation of the legislative power and control of the corporation of New York city over the streets within its limits, is that they shall be appropriated to no use or burden which is not alike free and common to all travellers. This power cannot be surrendered, either in whole or in part, into any hands whatever without previous legislative sanction. It seems that converting the streets into the track of a railway, and permitting rails to be laid upon them, and used by individuals or an association for carrying passengers or merchandise for hire, is devoting them to an exclusive use, and cannot be permitted without the express sanction of the legislature. And although the power to grant this permission must be derived from the legislature, yet the corporation, by exercising it, are not deprived of their control over the streets in all other respects; and they may, in the grant, impose such conditions respecting the manner in which the rails shall be used, and upon which the future use thereof shall depend, as they may think proper.

petent to make the grant, the making of it was a usurpation of power which can lawfully be exercised by the legislature of the state only.

"That neither of the city charters, nor any statute of the state, confers power in express terms to make such a grant. That the existence of such a power cannot be implied as being necessary to the exercise of any power expressly granted, or the performance of any duty enjoined by law.

"That no corporation, municipal or otherwise, possesses any powers except such as have been granted to it.

"That the resolution in question, when duly passed by the common council, and accepted by the grantees in the mode it prescribed, was not a law or ordinance repealable at the pleasure of the corporation, but a contract within the meaning of that clause of the constitution of the United States which prohibits every state legislature from passing any law impairing the obligation of contracts.

"That after being passed and accepted, so long as its conditions should be complied with, there being no power reserved in it to rescind or modify it, the corporation, if legally competent to pass it, would be incompetent to repeal it at its mere will and pleasure, so as to divest any rights of property acquired by the grantees under it.

"That the legislative power of a corporation is restricted by the constitutional and statute law of the state in which it is located, and that no state can grant to a corporation power to do that which the constitution of the United States prohibits it from doing itself.

"That the municipal corporation of this city cannot divest itself of nor abridge its legislative discretion and duty to alter and regulate the streets, as it may deem the public good requires. Nor can it prohibit such use of the streets by its inhabitants as is granted by a law of the state to every citizen as a matter of strict right.

"That the resolution in question is void, on the grounds: —

* "1. That it grants a franchise, which the common council has no authority to grant.

"2. The grant, by the meaning and legal import of its terms, may be perpetual.

"3. The grant, in judgment of law, is a contract between the

corporation and the grantees, and in its legal import restricts the corporation in the future exercise of its legislative powers.

"4. It confers upon the grantees and their associates exclusive privileges, to a partial use of Broadway, which may be of perpetual duration.

"5. It absolves them from an obligation imposed on them by a statute of the state. (2 Rev. Stats. 424, § 198.)

"6. It confers rights, and exempts the associates from consequences in the event of the death of one of their number, repugnant to and in conflict with the settled law of the state.

"7. It authorizes the grantees and their associates, however small may be their number, to become incorporated at any time under the General Railroad Act, although the road may have been previously constructed, while the act itself does not allow an incorporation, after a road shall have been built, nor of a less number than twenty-five persons.

"8. The grant and its acceptance constitute a contract, which the common council is prohibited from making, by the amended charter of 1849.

"9. The making of a grant by a municipal corporation, conferring such privileges and immunities without lawful authority, being a usurpation of power, and the illegal exercise of a franchise, may be enjoined by any court having jurisdiction of the subject-matter and of the necessary parties."

And although some of the judges in the Court of Appeals intimate an opinion that it is competent for the municipal authorities of the city to grant a railway, in the streets of the city, provided it be not a franchise or monopoly, and be equally open to all the citizens, the court held, that they have not power to grant the franchise for a railway.[7] This may be true in the abstract. * For the public authorities may doubtless lay down rails in the highways or streets, and allow all who choose to travel upon them with their own cars or carriages. And this must be substantially what is here indicated, we apprehend. But no such grant was here intended. And practically no one would accept any such grant.

[7] But it is held in Louisiana, that the city of New Orleans has the power to sell the right of way in the streets to private individuals for a specified time, with a privilege of laying tracks and running horse-cars over them, according to a tariff to be fixed by the common council. Brown *v.* Duplessis, 14 La. Ann. 842.

The decision must, therefore, as to the law, be regarded as virtually affirmed.[8]

5. When a city passenger-railway was incorporated by the legislature, upon condition that the consent of the city councils to use and occupy the streets should be obtained before the company should construct their track; and the city councils, by ordinance, declared their disapproval of the act, and declined to allow the streets to be so used; it was held that the grant thereby became inoperative, and that no subsequent consent of the city councils would give it effect.[9]

*6. The question of laying rails upon the public street in order to facilitate the transportation of passengers by means of railway cars, by permission of the municipal authorities and without legislative grant, was extensively discussed in the Court of Queen's Bench in the somewhat noted case of Regina *v.* Train and others,[10]

[8] In a late case, Cambridge *v.* Cambridge Railw., 10 Allen, 50, the court held, that a provision in the charter of a street-railway company, that at any time after ten years from the opening of any part of the road for use, a city may purchase of the company so much of its corporate property as lies within the limits of such city, at a specified price, does not give to the city any such interest or right as to enable it to maintain a bill in equity to restrain the corporation from raising passenger fares upon their road, in violation of conditions expressly assented to by the corporation, and imposed by the mayor and aldermen of the city, when granting to the company the power to locate and build a new line of their railway through additional streets, if they are guilty of no fraudulent intent to destroy or depreciate the value of the corporate property, although the value of their franchise and property will be thereby diminished, and the portion of their railway constructed under such authority will perhaps be exposed to forfeiture. In Branson *v.* Philadelphia, 47 Penn. St. 329, it was held, that, in respect to the care, regulation, and control of the highways within its corporate limits, the city of Philadelphia exercised a portion of the public right of eminent domain, subject only to the higher control of the state and the use of the people; and therefore a written license, granted by the city for a valuable consideration, authorizing the holder to connect his property with the city railway by a turnout and track, is not such a contract as will prevent the city from abandoning or removing said railway, whenever, in the opinion of its authorities, such action will tend to the benefit of its police.

[9] Musser *v.* Fairmount & Arch Street Railw., 7 Am. Law Reg. 284. The case is put upon the ground that the act was made dependent upon the election of the municipal authority, and that election being exercised determined the right.

[10] 9 Cox C. C. 180; 3 F. & F. 22; 8 Jur. N. S. 1151. The leading opinion of the court, on the final hearing, in full bench, will be interesting to the profession.

Crompton, J. — We have consulted the Lord Chief Justice, before whom the

where the following propositions are maintained: * That the laying down of a railway in a public street, by permission of the muni-

indictment was tried, who informs us that there was nothing like a bargain respecting the terms on which the question should be reserved; we are consequently at liberty to deal with it as an ordinary case, in which the question arises, whether or not there shall be a new trial; and, therefore, unless we already entertain doubts upon the matter, we should raise none. We are of opinion that the conviction was right. Here is an admitted nuisance, unless the case can be brought within the proposition laid down by Mr. Bovill, by which he seeks to distinguish the present from that class of cases which establish the rule, that it is no defence to an indictment for a nuisance to a highway, causing inconvenience to a portion of the public, who use it in the ordinary way, that it was committed for the benefit of others not so using it. He contends, that "it is a question for the jury whether what was done was not a reasonable and convenient arrangement of the highway, for the convenience of the public generally using that highway, and for the accommodation of the traffic passing over it." He is thus, as it seems to me, driven, in order to avoid any conflict with the class of cases to which I have referred, to confine his proposition to cases where the arrangement is for the benefit of the public using the highway, and for the accommodation of the traffic passing over it. Now, it appears to me that, admitting this proposition to be true, his case is not brought within its terms, inasmuch as this is clearly not a dealing with, or an alteration of, the highway in the ordinary manner, such as the construction of a footpath, a paved crossing, or the like. Cases might be put, where even such a dealing with a highway, however necessary and advantageous to a portion of the public, would be so complete an obstruction to the remainder of the highway as to amount to a nuisance; but, admitting, as I have already said, the proposition to be true, it appears to me that the present case is not brought within it, inasmuch as, so far from being an ordinary use of the highway, what is here complained of amounts to an actual withdrawal of a portion of it from its proper legitimate purposes. The construction of a tram-road, as it seems to me, must necessarily amount to a nuisance on a public highway, inasmuch as such carriages as are calculated to run upon it can neither give nor take space, as occasion may require, like vehicles of the ordinary build, but are immovable from the grooves on which they run; and, however convenient and cheap a conveyance it may be to a particular class of travellers, the class so benefited are not those who put the highway to its ordinary and legitimate use. I think, therefore, that the principle laid down in Regina *v.* The Longton Gas Co., 8 Cox, C. C. 317; s. c. 6 Jur. N. S. 601, applies, and that the legal carrying out of such a scheme as the present can only be effected by the authority of Parliament. It might, perhaps, be desirable that the question should be considered in a court of error; but, entertaining, as we do, no doubt upon the point, it would be scarcely consistent with our duty to grant a rule, and then to discharge it for this purpose, particularly as the defendants may contest the matter in another indictment, get the facts stated in a special verdict, and so entitle themselves to the opinion of a court of appeal. Mr. Bovill also took another point (if it deserves the title), and contended that the defendants, protected by the Metropolis Local Amendment Act,

cipal authorities, causing an obstruction to travel and dangerous to passengers, and without legislative authority, is a public nuisance, and cannot be justified or excused by proof that the railway was used by a great number of passengers, and that it afforded a cheaper and easier mode of travelling than by the ordinary conveyances; nor can such railway be considered a species of pavement, which an unlimited discretion will justify the municipal authority in laying down.

7. Where the legislature give the mayor and aldermen of the cities, and the selectmen of the towns, the power to make regulations concerning the removal of snow from the tracks of street railways within the limits of such municipalities, it is competent for such municipal authorities, in the exercise of such power, to prohibit the removal of such snow at any and all times and places whenever, in their judgment, the public interest requires it. And it is no objection to the validity of an order upon that subject, that it allows of such removal of the snow from the tracks of a street railway only, where it is allowed and in a manner to be designated by the superintendent of streets, or other officer having control of the management and repair of the streets,[11] or highways.

SECTION III.

Carrying Mails, and Troops and Munitions of War.

1. *In England this is controlled by legislation of the nation.*
2. *The division of sovereignty creates difficulty on that point.*
3. *But it would seem that the state and national legislatures may control it.*
4. *Mail agents may sue company for injury, in England.*
5. *Same rule adopted in this country.*

§ 251. 1. In England the sovereignty being one, and indivisible, there is no doubt of the right to require the aid of the railways of the kingdom upon such terms as a disinterested umpire may adjudge reasonable, in the transportation of the mails, and of troops and munitions of war.[1]

might allege, by way of answer to the indictment, that this was but a certain mode of providing for the paving of the highway; but this argument is simply ludicrous. I am, therefore, of opinion that there should be no rule.

[11] Union Railw. *v.* Cambridge, 11 Allen, 287.

[1] Public baggage, stores, &c., sent in charge of troops, must be considered as

* 2. The subject is embarrassed in this country by the division of the sovereignty into state and national, such companies deriving all their corporate powers from the state. And the transportation of the mails, as well as troops and the munitions of war in time of peace, being exclusively a national interest, it has been sometimes supposed that the national government was altogether at the mercy of the railways in regard to this species of transportation, except that they might claim to pass upon the same terms as other passengers and freight. The matter of the transportation of troops in time of peace is one of small importance, and where no serious abuse is likely to intervene. And in time of war all the resources of the nation are, of course, subject to the control of the national government.

3. But the transportation of the mails is one of constant expenditure, and of vast importance in the aggregate. But as the matter has not been discussed in the judicial tribunals, either of the states or nation, we cannot pretend to shed much light upon it. It would seem wonderful if the legislatures of the states and of the union have not the power to control the subject to the same extent as the British Parliament, by general legislation. And accordingly it will be found, that many of the states in their general railway acts have introduced provisions requiring the railways to transport the mails upon reasonable terms, and providing for an umpirage where the parties do not agree.

4. In England it has been held, that the officers of the post-office who are required to be in charge of the mail during its transportation, may have an action against the railway company transporting the same, for any injury sustained through their negligence, although there subsist no contract between the parties, and none in any form, except for the transportation of the mails, with the proper incidents connected therewith, and the injury was received while in the performance of their official duty, in charge of the mails.[2]

the baggage of such troops, under the English statutes, and must be carried by a railway company at the rates specified in 7 and 8 Victoria, ch. 85, § 12. Attorney-General *v.* Great Southern & Western Railw., 14 Ir. Com. Law Rep. 447.

[2] Collett *v.* London & North W. Railway, 16 Q. B. 984; s. c. 6 Eng. L. & Eq. 305. Lord *Campbell*, Ch. J. here says, "The duty does not arise from any contract with the plaintiff, but from the obligation imposed by the legislature upon the company to carry the mail-bags and the officers of the post-office in

* 5. Almost precisely the same point was decided in a late case[3] in New York, in regard to the United States mail agent, who was injured while on board the company's cars in the discharge of his official duties, in charge of the United States mail, there being no contract for carrying plaintiff except with the government, and in connection with carrying the mail. The decision of the court is expressed in the language of Lord *Campbell*, Ch. J., in the case of Collett *v.* London & N. W. Railway.[4]

charge of the letters. If it be the duty of the company to carry the plaintiff at all, it must be their duty, in doing so, to use reasonable care and skill."

That the establishment and maintenance of public posts is an exclusive prerogative of sovereignty, is a proposition admitting of no question. The history of the establishment of public posts, for the conveying of public intelligence, and for other purposes connected with governmental administration, is curious.

They are mentioned as having been established, in the Persian empire, as early as the time of Cyrus (Xen. Cyrop. lib. 8); and in Rome, in the time of Augustus (Suet. in Vit. Aug. c. 49). Plutarch, in his life of Galba, mentions, that the magistrates were obliged to furnish horses for this service, upon proper requisition. And the younger Pliny, in writing the emperor Trajan, apologizes for having resorted to the use of the public post-chaises, under his charge, for private purposes, in a case of painful emergence, the death of a near family relative; and where he desired to have his wife pay her condolence to the surviving members of the bereaved family, in the freshness of their grief. The emperor's reply is a model of state papers, brief and pertinent. Book X., Letter 122, Pliny's Letters. Louis XI., it is said, first established them in France, in 1474; and it was not till the 12th of Charles II. that the post-office was established in England, by act of parliament.

The history of the subject shows, that it has always been regarded as one of the rights pertaining to sovereignty, and that the citizen, or subject, felt bound to lend all requisite aid in its accomplishment. That the sovereign should be at the mercy of the citizen, in this respect, involves the same inconsistency, as that it should be so in regard to the other rights of eminent domain.

[3] Nolton *v.* Western Railway, 10 How. Pr. R. 97.

[4] 16 Q. B. 984; s. c. 6 Eng. L. & Eq. 305.

* CHAPTER XXXVIII.

THE CONSOLIDATION OR AMALGAMATION OF COMPANIES.

SECTION I.

The Power of the Legislature to combine Companies.

1. *The power of the legislature unquestioned in England.*
2. *Consent of the shareholders necessary in this country. But acquiescence probably sufficient.*
3. *Beyond the power of railway companies in England to combine without legislative permission.*

§ 252. 1. THERE seems to be no question made in England of the power of different railway companies, or railway and canal companies, to amalgamate or combine their interests and their stock by agreement, with the consent of Parliament, under a special act.[1] This is every-day practice there, and seems to be a very useful and just mode of arranging the business of different lines, or the same continuous line often, where competition is liable to do harm, both to the traffic and the shareholders. Some few questions, of no great importance, have already been decided upon this subject. In a case where two canals were combined with the grant of a railway, and the railway company were, by the special act, to pay the canal companies a specified price per share for all their shares, "from and immediately after the opening of the railway from A. to G. for public use"; the railway being so opened, the whole length of the Grantham Canal, but * not the whole line, as specified in the act, the remaining portion being that which

[1] Under a clause in the deed of settlement of a company, giving power to the directors to act in their discretion as they should think for the interests of the company, *quære* whether they could purchase the business and take the assets and liabilities of another company; but where the shareholders had acquiesced in the amalgamation, and the dealings had been such that it was impossible to replace the companies in their original position, it was held at any rate too late to disturb the arrangement which had been made. Saxton Life Society *in re*, 32 L. J. Ch. 206. And see s. c. *ex parte* Era Life and Fire Ins. Co., 1 De G. J. & Sm. 29.

competed with the Nottingham Canal; the Grantham Canal brought an action for the price of their shares. It was decided, in the court below, that no recovery could be had until the whole railway was opened for public use, according to the terms of the act.[2] But in the same case in the Exchequer Chamber,[3] it was decided by a divided court, that the railway being opened, so far as competed with the G. canal, it was the fair import of the act, although containing no distributive words, that each canal company might recover its several interest, whenever the railway was fully opened, as to competition with their interests.[4]

2. But in this country it seems to be regarded as indispensable, under the restriction in the United States constitution, that the consent of all the shareholders, to the amalgamation of different companies, should be obtained.[5] But, except in the case

[2] Grantham Canal Co. *v.* Ambergate, Nottingham & Boston & Eastern J. R., 15 Jur. 991; s. c. 6 Eng. L. & Eq. 328.

[3] 16 Jur. 946; s. c. 12 Eng. L. & Eq. 439.

[4] This seems to be a very just and reasonable decision, but not altogether consistent with the terms of the act. But it is a striking illustration of the strong inclination of the English courts, both of law and equity, ordinarily, to escape from merely verbal and technical obstructions to the attainment of the full justice of the case.

[5] Fisher *v.* Evansville & Crawfordville Railway, 7 Porter (Ind.), 407. See also Kean *v.* Johnson, 1 Stockt. Ch. 405–424, for an elaborate opinion upon this subject, where the special master, sitting for the Chancellor, arrives at the conclusion, that the legislature have no power to consolidate different railway companies without the consent of all the shareholders, and, as the statute provides, that nothing therein contained should affect "any right whatever," it should receive the construction, that the consolidation provided for should be effected, in the only practicable mode known to the law, which would not affect rights, i. e. by the consent of all the shareholders. Chapman *v.* M. R. & L. E. R. & S. & Ind. Railway, 6 Ohio N. S. 119. The act of amalgamation is not void, but voidable at the election of shareholders. McCray *v.* The Junction Railw., 9 Ind. 358. Stock subscriptions are thereby released. Ib. In State *v.* Bailey, 16 Ind. 46, it was held that corporations can only consolidate with the consent of the legislature, and when a consolidation is thus effected, it amounts to a surrender of the old charter, and the formation of a new corporation out of such portions of the old as enter into the new. And see McMahan *v.* Morrison, 16 Ind. 172. Where two railway companies, in an agreement for consolidation, inserted an article to provide for the completion and running of the route of one of the two companies, and the directors of the consolidated company failed to comply with the provisions of this article, it was held, that if the duty thus created was owing to all the stockholders, one of the stockholders could not sustain an action against the directors, to enforce a compliance therewith; and if the duty was

* of unpaid subscriptions and analogous matters, the shortest acquiescence of the stockholders, in the combination of different companies by act of the legislature, will be likely to be held by the courts as conclusive of their right to interfere.[6]

3. But it seems to be regarded in England as beyond the powers of railway companies to combine their interests and equalize their dividends without an enabling act of the legislature. And it was held, that a single shareholder was entitled to apply to a court of equity to restrain such an attempt.[7] And it is competent for one shareholder to maintain a bill for an injunction restraining the company from doing an act beyond the range of the statutory powers conferred upon them.[7] But a private individual is not entitled to move an injunction against a public company for exceeding their powers, unless he suffers an actual injury in consequence.[8]

* SECTION II.

What amounts to an Amalgamation of Railway Companies.

1. *Mere association or alliance not sufficient.* | 2. *Agreement to amalgamate from a day past.*

§ 253. 1. It has been held that one railway company associating, allying, and connecting itself with another in regard to

owing to a class of stockholders having in the matter a right or interest distinct from the rest of the stockholders, any proceeding to obtain relief for a refusal or neglect of the directors to discharge that duty, must bring before the court not only the directors of the company, but the two classes of the stockholders. Port Clinton Railw. *v.* Cleveland & Toledo Railw., 13 Ohio, N. S. St. 544. Where two companies were amalgamated by agreement, the first company covenanting to indemnify and hold harmless the stockholders of the second company, only those members of the second company who have executed the agreement can claim specific performance of the contract of indemnity. Anglo-Australian Insurance Co. *v.* British Provident Insurance Co., 8 Jur. (N. S.) 628.

[6] Chapman & Harkness *v.* Mad River & Lake Erie Railway, and Sandusky City and Indiana Railway, 6 Ohio N. S. 119. Two companies cannot consolidate their funds, or form a partnership, unless authorized by express grant of the legislature, or necessary implication. N. Y. & Sharon Canal Co. and Sharon Canal Co. *v.* Fulton Bank, 7 Wend. 412. The majority of a corporation cannot bind the minority, by the acceptance of a fundamental alteration of their charter. *Ante*, § 56. See Macon & Western Railway *v.* Parker, 9 Ga. 377.

[7] Charlton *v.* Newcastle & Carlisle Railw. Co., 5 Jur. (N. S.) 1096.

[8] Ware *v.* Regents Canal Co., 3 De G. & J. 212; s. c. 5 Jur. (N. S.) 25.

traffic, in which they have a common interest, does not amount to an amalgamation between the two companies.[1] An amalgamation seems to imply such a consolidation of the companies as to reduce them to a common interest.

2. An agreement to amalgamate from a day past seems to be considered, in equity, as an actual amalgamation from that time. But an agreement to do so from a future time cannot amount to an amalgamation until the time arrive.[1]

SECTION III.

What Contracts made before Amalgamation enforced afterwards.

1. *Where the amalgamation is legal, all prior contracts may be enforced.*
2. *But where any formalities are not complied with, it is otherwise.*
3. *Admissions by the company contracting, good against consolidated company.*
4. *Consolidated company may apply funds to pay debts of former companies.*
5. *Instance illustrating the right to amalgamate.*
6. *Validity of proceedings in insolvency against one of the former corporations, after consolidation.*
7. *One of the consolidated companies may make a valid mortgage for its own debts after the consolidation. Effect of contract between different companies to build connecting road, &c.*
8. *Contract of railway company for arbitration, enforced after its consolidation.*

§ 254. 1. Where the amalgamation is strictly legal, and no impediment arises in regard to the form of the remedy, it would seem a contract, made before amalgamation, should be capable of being enforced after. And where a clerk to a railway * company had executed a bond, with surety, for the faithful discharge of his duty to one company, which was subsequently amalgamated by act of parliament with another railway company, saving to the consolidated company all remedies upon contracts to either, it was held an action will lie upon such bond.[1] So, too,

[1] The Shrewsbury & B. R. *v.* Stour Valley, and the London & N. W. R., 2 De G. M. & G. 866; s. c. 21 Eng. L. & Eq. 628; Midland G. W. R. of Ireland *v.* Leech, 3 Ho. Lds. 872; s. c. 28 Eng. L. & Eq. 17.

[1] London, Br. & S. C. Railway *v.* Goodwin, 3 Exch. 320; s. c. 6 Railw. C. 177. And the same point is so ruled in Eastern Union Railway *v.* Cochrane, 9 Exch. 197; s. c. 24 Eng. L. & Eq. 495. In the former case the breach was committed before, and in the latter, after, the amalgamation. And the same principle is applied to determine the liability of the companies, after consolidation, in Gould *v.* Langdon, 43 Penn. St. 365.

such bond is good security to the new company for the faithful conduct of such clerk in the employ of such new company.[2]

2. But where the amalgamation is illegal calls cannot be enforced, or, if the provisions for the amalgamation had not been fully carried into effect, no suits for calls in the name of the new company can be sustained.[3]

3. And in an important case in the United States Supreme Court,[4] it seems to have been held, that in an action against the amalgamated company, upon a contract for construction made by one of the consolidated companies, the admission or act of the company making the contract will bind the aggregate company by way of estoppel *in pais*.

4. And where a railway and canal company were formed by the union of several ancient canals and three railway companies, and power was given to the united companies to issue new shares for the purpose of raising capital, it was held no misapplication of the funds of the new company to apply them first to the payment of a large debt of one of the canal companies.[5]

[2] Eastern Union Railway Co. *v.* Cochrane, 9 Exch. 197 ; s. c. 24 Eng. L. & Eq. 495. And see Robertson *v.* Rockford, 21 Ill. 451.

[3] Midland G. W. Railway of Ireland *v.* Leech, 3 House L. Cases, 872; s. c. 22 Eng. L. & Eq. 45; *ante*, § 56.

[4] Philadelphia, Wilmington, & Baltimore Railway *v.* Howard, 13 How. 307. And see McMahan *v.* Morrison, 16 Ind. 172.

[5] Cooper *v.* The Shropshire Union Railway and Canal Co., 6 Railw. C. 136.

The Richmond and Miami Railway, which was created under the laws of Indiana, and owned a railway running from Richmond to the Ohio State Line, and the Eaton and Hamilton Railway, which was created under the laws of Ohio, and owned a railway running from Eaton, Ohio, to the state line of Indiana, in the direction of Richmond, were, by virtue of laws of these respective states, consolidated into one company, called the Eaton & Hamilton Railway Co. The law in neither state, in terms, surrendered to the other any jurisdiction over the property of the existing companies. Prior to the consolidation, the Indiana company issued sixty bonds, of one thousand dollars each, and executed a first mortgage on their road to secure payment of such bonds to a trustee, with interest payable semiannually, and these bonds were also guaranteed by the Ohio company. Afterwards, but also prior to the consolidation, the same company issued forty additional bonds, each for the same amount as before, and made a second mortgage on their road to the same trustee to secure their payment. By the articles of consolidation it was agreed that the companies should become united as one, under the name aforesaid; that the corporate name, franchise, &c., of the Eaton & Hamilton company should be preserved and remain intact as if no consolidation had been made, except as far as modified by the enlarged interests of the company and the laws of Indiana; that all property and franchises of the

*5. Where the preliminary contracts by which two railway companies were set on foot, each provided that the managing committees or directors might "demise or sell the undertaking, or any part thereof, or amalgamate the same or any part thereof, *with any other railway* or railways, and the directors of the two companies made and carried into effect an amalgamation of the *two companies, which necessarily interfered with each other's business, it was held, that the amalgamation of these two companies came fairly within the preliminary contracts, and that an action for calls might be maintained against any shareholder in either company who had executed the preliminary contracts."[6]

6. In a case[7] before the highest court in the State of Connecticut, where the question arose in regard to proceedings in insolvency against one corporation, which by acts of different state legislatures had been consolidated with other companies in other states, considerable doubt is expressed in regard to the mode and the binding of effect of such proceedings, and, although the pro-

Indiana company were thereby transferred to and merged in the Ohio company, and the organization and name of the former should cease; that the Ohio company should assume such property and franchises, and pay all the liabilities of the Indiana company. Prior to the consolidation, bonds had been issued by the Ohio company, which had been made liens on its road; and after the consolidation, bonds were issued and made a lien on the entire road. The holders of the first bonds, issued by the Indiana company, sued to enforce payment of their bonds, by a foreclosure of their mortgage, the trustee having refused to sell under the power therein contained. The suit was instituted against the Eaton & Hamilton Railway, which appeared and defended; and it was held by the Supreme Court of Indiana, first, that such consolidation at least effected a transfer of the property of the Indiana company to the Ohio company, and that the suit was therefore properly brought against the latter corporation: Secondly, that the Ohio company, having acquired property in the road in Indiana, after the execution of the said two mortgages, took the same subject thereto; and that the holders of the first mortgage bonds had the right to enforce the payment thereof by proceedings for a foreclosure in the Indiana courts, and a sale of the property in Indiana: Thirdly, that the power given in said first mortgage to the trustee to sell the road in certain events, if it could be exercised by him at all, did not prevent the bondholders from asserting their rights by foreclosure, but was merely a cumulative remedy: Fourthly, that the courts of Ohio would have no jurisdiction to enforce the foreclosure of said mortgage, and that neither the agreements nor the laws above referred to gave them such jurisdiction, if indeed it could in any way be given. Eaton & Hamilton Railw. *v.* Hunt, 20 Ind. 457.

[6] Cork & Yougal Railway *v.* Patterson, 18 C. B. 414. See *ante*, § 56, n. 1.

[7] Platt *v.* N. Y. & Boston Railw., 26 Conn. 544.

ceeding seems to have been recognized as regular and valid in that case, it is very obvious there must always exist serious embarrassment in bringing such proceedings to any satisfactory determination.

7. And it has been considered that one or two or more consolidated railway companies may make a valid mortgage of its property for its own debts, even after the consolidation.[8] Two or more companies entered into a joint contract for building a connecting railway, one of the parties to the contract to build the new road, the other parties contributing in a fixed proportion to the expense, the company owning the road to control it, and to pay over its net earnings to a trustee, who should distribute the same monthly among the contributing parties until their advances were reimbursed; the road to be owned by all the companies in proportion to their contributions. Subsequently and before the road was built, another contract was made between the parties, by which it was agreed to run an express through train over the road, twice daily, for five years. The road was built and the expenses contributed by the several companies, except a portion due from one of them, which was collected by suit. But in consequence of the insolvency of one of the companies, the arrangement for through trains failed, and the new road fell into decay. Subsequently, and after some years, the company which built the new road renewed it, and used it in connection with its own. Upon a bill in equity, brought by the purchaser of the insolvent company's road, for an account of the earnings of the new road built by the contract, it was held, that the contract for building the road and for running the through trains, were distinct and independent of each other, and that the duty of the respondent company, to apply the earnings of the new road, to reimbursing the expense of building it, was not affected by the insolvency of one of the contracting parties, and the failure of the through trains; and a trustee and receiver of the earnings of the new road was appointed and an account ordered.[9]

8. And where a railway company entered into a contract, one of the terms of which was that the principal engineer, so long as he remained such, should be the arbitrator in all matters of

[8] Wright *v.* Bundy, 11 Ind. 398.

[9] Bartlett *v.* Norwich & Worcester Railw., 33 Conn. 560.

difference in regard to the contract, and that company was subsequently amalgamated with another company, and, disputes having arisen in regard to the contract, it was held, that such person was still the proper arbitrator, he remaining in the same office.[10]

[10] Wansebeck Railw. Co. *v.* Trowsdale, Law Rep. 1 C. P. 269; s. c. 12 Jur. (N. S.) 740.

*CHAPTER XXXIX.

MISCELLANEOUS MATTERS.

SECTION I.

Jurisdiction of the United States' Courts.

1. *Corporation sued as "citizen" of a state.*
2. *Residence of shareholders immaterial.*
3–5. *Review of decisions. Corporation liable where it exists and was chartered.*
6. *Service of process upon authorized agent in another state.*
n. 6. *Liability in foreign attachment-process maintained by English courts.*

§ 255. 1. CONTRARY to the earlier decisions of the United States courts it is now settled that a corporation is to be regarded as a "citizen" of the state where it exists, and as such may be sued, in that circuit, by a citizen of any other state.[1]

2. And it makes no difference that the shareholders and members of the corporation reside in different states, as it is the artificial being created by the act of incorporation which is the party, and not the corporators.[2]

3. But a railway company cannot be said, either at law or in equity, to reside in a different district from the one where it exists and was chartered. Nor can a circuit court of the United States take cognizance of a controversy in one district or state, where the subject-matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the locality of the controversy.[3] This was the case of a * railway

[1] Marshall *v.* Baltimore & Ohio Railw., 16 How. 314. Mr. Justice *Grier*, in giving the opinion in this case, cites the case of Louisville, Cincinnati, & Charleston Railw. *v.* Letson, 2 How. 497, as having virtually decided the question, and as having been so regarded and recognized by the profession and the court. See also Works *v.* Junction Railw., 5 McLean, 425; Culbertson *v.* Wabash Nav. Co., 4 McLean, 544.

[2] Louisville Railw. *v.* Letson, 2 How. (U. S.) 407. See also *ante*, § 20, and cases cited. But see Ohio & Mississippi Railw. *v.* Wheeler, 1 Black (U. S.), 286; Wheeden *v.* Cam. & Amb. Railw., 2 Philadelphia, 23; s. c. 1 Grant's Cases, 420.

[3] Northern Indiana Railw. *v.* Michigan Central Railw., 15 How. (U. S.) 233. See Wheedon *v.* Cam. & Amb. Railw., 2 Philadelphia, 23; s. c. 1 Grant's Cases,

in Indiana entering into an agreement with a railway in Michigan to allow them to build and operate their road under their charter. Another railway company in Indiana, claiming that their rights were being infringed, filed a bill in equity in the United States District Court for the District of Michigan, to enjoin the company in that state, who were proceeding under the contract without making the other party to the contract a party to the bill. The Circuit Court upon hearing dismissed the bill, and the Supreme Court affirmed the decree. The Supreme Court held also, that the other party to the agreement was a necessary party to the bill.

4. In a suit in Indiana, in the Circuit Court of the United States, between the same parties, it was held that a corporation is not amenable to process except in the state where its business is done.[4] A corporation in Indiana cannot sue, in that state, a

420. It is here held, that though a corporation is not *per se* a citizen within the meaning of the Constitution of the United States, yet when sued, if its governing officers, who are the substantial parties, are citizens of the state which created the corporation, and the other party is a citizen of another state, the federal courts have jurisdiction, and the suit is removable under the act of 1789, called the judiciary act.

But a claim against a railway company for the loss of goods as a common carrier is a chose in action, and not assignable so as to enable the assignee to sue in the United States courts, unless the assignor could have sued in these courts. Ayres *v.* Western Railw., 48 Barb. 132.

[4] And see Ohio & Mississippi Railw. *v.* Wheeler, 1 Black (U. S.), 286. It is held in this case, that if all the members of a corporation are citizens of one state, it may maintain a suit in the federal courts against a citizen of another state: that the presumption is, that all the members of a corporation are citizens of the state which created it; and that no averment to the contrary will be heard for the purpose of withdrawing the suit from the jurisdiction of the court. But it is also held in this case, that a corporation chartered in two states cannot have the same legal being in both; they are two separate corporations, and cannot unite to sue a citizen of either state. And the Supreme Court of Indiana lately held that a corporation, created by a special charter from the state of Indiana, in which the corporation is made to consist of certain directors and their successors, with power to construct a railway in said state, and in connection therewith to own and manage certain property in the state of Ohio, could not, by reason of such authority, change its domicile to the latter state. Aspinwall *v.* Ohio & Mississippi Railw., 20 Ind. 492. And see, as to foreign corporations, Boley *v.* Ohio Life Ins. & Trust Co., 12 Ohio (N. S.) 139; Sprague *v.* Hartford, Providence, & Fishkill Railw., 5 R. I. 233. See, as to jurisdiction of state courts over matters pending in the federal courts, Ohio & Miss. Railw. *v.* Fitch, 20 Ind. 498. And a person suffering injury upon the defendants' rail-

corporation doing business in the State of Michigan. Where the * subject is essentially local, the action must be brought in the state where the injury is done.[5]

5. It has been held that an insurance company chartered by one state and having its principal place of business there, is to be regarded as a citizen of that state, for the purpose of maintaining suits or being sued in the Circuit Courts of the United States.[4]

6. But it was also held, in this case, that a judgment recovered against such company in another state, by service of process upon an agent of the company doing business there, on behalf of the company, and who was permitted so to transact such business, by consent of the legislature of that state, upon condition that service of process upon such agent should be regarded as service upon the company, was a valid judgment, and entitled to the same consideration in the state where the company was located as in the state where rendered.[6]

SECTION II.

Liability for doing an Act prohibited by the Company's Charter, without Special Damage to the Party interested.

§ 256. Where the owner of a ferry across the river Mersey was protected in his rights by a section in the special act of a

way in New York may maintain an action for the same in the courts of New Jersey. Ackeeson *v.* Erie Railw., 30 N. J. 309.

[5] Northern Ind. Railw. *v.* Mich. Cent. Railw., 5 McLean's C. C. 444. See also Woolsey *v.* Dodge, 6 id. 142. The same general doctrine is somewhat elaborated in Baltimore & Ohio Railw. *v.* Glenn, 28 Md. 287. It is here said that corporations can have no status away from the state of their creation; they cannot transfer themselves, at will, beyond the limits of that state. But they may enter into binding contracts, through the instrumentality of agents, in other states.

[6] Lafayette Insurance Co. *v.* French, 18 How. 404. In a recent case before the House of Lords, the question was determined that an English railway company may be sued in Scotland by process of foreign attachment. London & Northwestern Railw. *v.* Lindsay, 3 Mc Qu. Ho. Lds. 99; s. c. 30 Law Times, 357. But this question is influenced by the peculiar deference of the Scottish courts to taking jurisdiction of parties domiciled abroad, through the operation of the process of foreign attachment. That seems to be one of the peculiar and

railway, prohibiting the company from extending their road across the river until certain other works were finished, it was held that he might maintain an action against the railway company, for violating such provisions of their act which were obviously inserted for his protection only, and not with any reference to the public interests, without showing the special damage he had thereby sustained.[1]

* SECTION III.

Mode of reckoning Time.

Difference between that of England and America.

§ 257. By the English statute twenty-one days are allowed the shareholders, after notice of the making of calls, in which to make payment. This means twenty-one clear days, exclusive of the first and last days.[1] But it is questionable whether the same construction would be applied to a similar provision in this country, unless the terms of the statute were very explicit in that direction. The more common mode in this country, in reckoning time specified in a statute, is to exclude the day from which the period is reckoned, and to include the day of its accomplishment.[2]

SECTION IV.

Service of Process upon Companies.

§ 258. Where a statute provided that, unless the company designated some agent, within certain precincts, upon whom service might be made, it would be competent to summon the com-

long standing infirmities of the Scottish courts. And with all due submission, it has seemed to us, that in regard to *ex parte* divorces, and some other matters, the American courts have adopted the practice of the Scottish courts, without much consideration, partly, perhaps, because they seemed convenient for the emergency; and partly too, possibly, because we derive so much that is good, and so little that is not, from that excellent country.

[1] Chamberlaine *v.* Chester Railway, 1 Exch. 870.

[1] *In re* Jennings, 1 Irish Eq. (N. S.) 236; Hodges, 107.

[2] Bigelow *v.* Wilson, 1 Pick. 485, opinion of *Wilde*, J.

pany, by service upon any officer, superintendent, or managing agent of the company within the precinct, and service was made upon the freight agent of the company, it was held competent for the company to defeat the service and the jurisdiction of the court by showing that they had a director within the precinct, upon whom service should have been made.[1]

[1] Wheeler *v.* New York & Harlem Railw., 24 Barb. 414; *Ante*, § 255, n. 5. In Iowa, a railway company may be sued in any county through which its road passes, or in which its corporate powers are exercised. Richardson *v.* Burlington & Mo. River Railw., 8 Iowa, 260. For the practice in Ohio, see Fee *v.* Big Land Iron Co., 13 Ohio (N. S.), 563. These matters are generally regulated by statute in the different states. Dixon *v.* Hannibal & St. Joseph Railw., * 31 Missouri, 409; Farnsworth *v.* Terre Haute, Alton, & St. Louis Railw., 29 id. 75; Sprague *v.* Hartford, Providence, & Fishkill Railw., 5 R. I. 233; Sullivan *v.* La Crosse & Minn. Packet Co., 10 Minn. 386; New Albany & Salem Railw. *v.* Tilton, 12 Ind. 3; Ohio & Miss. Railw. *v.* Boyd, 16 Ind. 438; Peoria Ins. Co. *v.* Warner, 28 Ill. 429. In Conn. Mutual Life Ins. Co. *v.* C. C. & C. Railw., 41 Barb. 9, it was held, that where bonds and coupons, though executed in the state of Ohio, were payable in the state of New York, the cause of action arose in the latter state, and its courts would have jurisdiction, even though both parties might be foreign corporations. 41 Barb. 9. And see Harris *v.* Som. & Ken. Railw., 47 Maine, 298. See Taft *v.* Mills, 5 R. I. 393. Service of summons on a travelling agent of an insurance company, or upon one authorized only to effect insurance, is not a valid service upon the company; Parke *v.* Commonwealth Ins. Co., 44 Penn. St. 422. See Kennard *v.* Railroad, 1 Wallace, Philadelphia, 41; Ohio & Mississippi Railw. *v.* Quier, 16 Ind. 440. As to the English practice, see Unity General Assurance Association *in re*, 11 W. R. 355; London & Westminster Wine Co. *in re*, 9 Jur. (N. S.) 1102; National Credit & Exchange Co. *in re*, 7 L. T. (N. S.) 817; Keynsham Blue Lias Lime Co. *v.* Baker, 2 H. & C. 729.

It is not competent to give jurisdiction to the courts of another state over corporations not incorporated there, or having any business agency there, by the service of process upon the president of the company; and if judgment were entered by default in an action against the company, so brought, the same would be stricken off by the court, whenever brought to its notice. Buck *v.* Ashuelot Manuf. Co., 4 Allen, 357.

* CHAPTER XL.

PLEADING.

SECTION I.

Declaration. — Motion in Arrest.

§ 259. It is not intended to give even an outline of the pleadings in actions affecting railways. That would carry us quite too far into the general subject of pleading, which is now falling into disregard, if not into disrepute, in this country, and in regard to which, like every thing else here, and everywhere, more or less, there is no backward step.

But we have deemed a brief reference to some of the more practical points decided, since railways have engrossed so much of the business of the country, in relation to the necessary forms of pleading, as not unworthy of notice.

It has been held, that in a declaration for injuries to animals, the general allegation that the plaintiff's animal was upon defendants' road, and there negligently and carelessly run over and killed by their train, is sufficient. And that such declaration is good, after verdict, even although it may have appeared on trial that the negligence of defendants consisted in defect of fences, and not in the management of the train; that questions of variance between the declaration and proof should have been taken on trial, and cannot be raised in arrest of judgment; that judgment will not be arrested after verdict, for any defect in the pleading which might be fatal on demurrer, if, from the pleadings and the course of the trial, as shown by the exceptions, it is manifest that the requisite facts, defectively stated or omitted in the pleadings, were proved on trial; and that it is not necessary to allege that plaintiff was without fault.[1]

[1] Smith *v.* Eastern Railw., 35 N. H. 356; Oldfield *v.* N. Y. & Harlem Railw., 4 Kernan, 310.

Indebitatus assumpsit is a proper form of action to recover money due upon subscription to stock in a railway.[2]

* The conductor of a railway train is a special agent of the company, and service may be made upon them through him, under the statute of Indiana.[3]

Under the English practice, where in an action for calls upon subscription to stock the declaration sets out in detail the authority for making such calls, it is competent for the defendant to plead "never indebted," thus putting the plaintiff upon the proof of his entire declaration.[4]

In an action on the case against a railway company for damage caused to a horse by the neglect to fence their road, by reason whereof the horse escaped and went at large and thereby received such injury, the declaration stated that the defendants neglected to keep a suitable fence along their track, and for want of "such fence the plaintiff's horse escaped from his pasture and went at large, and by means of going at large as aforesaid the horse was greatly injured"; and it was held, that although the declaration might be bad on demurrer, it was sufficient on a motion in arrest of judgment after verdict for the plaintiff.

In an action for default of common carriers in not transporting perishable goods in a reasonable time, whereby the same were spoiled, it was held sufficient to allege the delivery on board the defendants' boat of certain poultry, and the receipt of the value by him for transportation to New York, on the same day, and that the defendant did not proceed to New York with the same, on that day, nor within a reasonable time afterwards, "but so negligently conducted himself in that behalf, that said poultry was not conveyed to New York and delivered there, until the same, in consequence of such negligence, became spoiled."[5]

In an action founded on the duty to build fences by a railway company, brought against the receivers and trustees of the same under mortgage, enough must be alleged to show, that the defendants were operating the road, under such circumstances, as to have assumed the statutory duty of maintaining the fences. But if it is alleged, that the injury occurred by reason of the careless-

[2] Peake *v.* Wabash Railw., 18 Ill. 88.

[3] New Albany Railway *v.* Grooms, 9 Ind. 243.

[4] Welland Railw. *v.* Blake, 6 H. & N. 410.

[5] Peck *v.* Weeks, 34 Conn. 145.

ness of the defendants and their servants, in driving an engine or locomotive, whereby the same ran against and killed the plaintiff's cattle, it shows a good cause of action at common law. [6]

[6] Cooley *v.* Brainerd, 38 Vt. 394. An allegation of duty, without stating the facts upon which the duty arises, is immaterial in pleading and of no force. Hewison *v.* New Haven, 34 Conn. 136.

APPENDIX OF LATER CASES.

APPENDIX OF CASES

REPORTED SINCE THE EDITION WENT TO PRESS.

COMMON CARRIERS.

Delivery to wrong person.

Carrier is responsible in such cases, without regard to the question of due care or negligence on his part. Hall *v.* Boston & Worcester Railw. 14 Allen, 439.

Where property is stolen from carrier's warehouse.

In actions to recover for property stolen while in the custody of carriers, as warehousemen, it is competent to show, in defence, that the defendants exercised the same degree of care in keeping the property safely which is usually exercised by other companies in the vicinity in regard to similar property similarly situated. Cass *v.* Boston & Lowell Railw., 14 Allen, 448. But, in such cases, the burden of proof is upon the carrier to show that the loss occurred without his fault. Ib.

One company drawing the trains of other companies over its road.

In such cases, the company drawing the passenger or freight trains of another company over its road assumes the responsibility of common carriers, and as such is responsible to the same extent as other carriers of freight or passengers. Vermont & Mass. Railw. *v.* Fitchburg Railw., 14 Allen, 462. And it will not exonerate the company, in such case, from its responsibility to the other company, whose cars it thus transports, that the latter company agreed to assume all responsibility for damage or loss occurring in the transit, unless accruing from the negligence of the other company or defect in its track; and that this loss occurred from defect in its track, but which defect occurred without fault on its part. Ib.

Contracts exempting carrier from all responsibility.

Such contracts will not exempt the carrier from responsibility for actual negligence either of himself or his servants. Penn. Railw. Co. *v.* Butler, 57 Penn. St. 335.

In Penn. Railw. *v.* Books, 57 Penn. St. 339, where two trains came in collision, whereby the plaintiff below suffered damage, the court held, that the habits and competency of the conductors upon the trains might be put in evidence, as ground of showing that the collision occurred by culpable negligence. And, also, that when a habit of intoxication on the part of the conductor is shown, it raises a presumption of negligence in case of accident. It would seem more in accordance with former rules of evidence, to presume negligence from the occurrence of the accident. The character and habits of the agents of the company at the time opens a rather broad field of inquiry.

There are some most unquestionable propositions as to the admissibility of the declarations of agents and servants in general, and of corporations in particular, here laid down; but they are of no great practical value. The difficulty is to know when the declaration of an agent or servant is to be regarded as part of the *res gesta*. That is not to be assumed merely because the declarations are contemporaneous with the act, which seems to have become the general ground of admissibility of late; but it is requisite to the admissibility of the mere declarations of a person not in interest, that the declarations should not only be made at the time of the act, but that they be made for the purpose of qualifying or giving character to the act. Unless this be so, the declaration is not admissible.

It is here said, that every one riding upon a passenger train is presumed to be there lawfully, and *prima facie* as a passenger. The burden of showing the contrary is upon the carrier. But if the person be riding upon an employee's pass, the presumption is that he was an employee or servant of the company, and the burden of showing the contrary is upon him. Ib.

Damages,

It is here said, will include a reasonable compensation for suffering, expense of medical attendance, loss of time; but unless the injury is wantonly inflicted, the damages must be strictly compensatory. Ib.

The damages are for compensating the pecuniary loss, and not as a *solatium*. Ib. But See Penn. Railw. *v.* Allen, 53 id. 276.

Keeper of ferry responsible as common carrier.

The keeper of a public ferry across the Mississippi River is responsible as a common carrier, and liable to an action for failing to transport plaintiff's cattle, in consequence of not having his boat in condition for use; and the fact that he is subject to a penalty for such default by the terms of the license from the city will make no difference. Slimmer *v.* Merry, 23 Iowa, 90.

Effect of carrier's notice or contract in regard to responsibility. — Delay of freight.

Will not exempt the carrier from the duty of using ordinary diligence in carrying freight forward in reasonable time. The burden is upon the plaintiff, in such cases; but he will make a *prima facie* case, by showing an unusual delay in delivering the goods, with reference to the general course of business. Mann *v.* Birchard, 40 Vt. 326.

Where cattle were placed in cars in season for the night train, with the knowledge of the station agent, and two trains passed without taking these cars, and in the morning the plaintiff took his cattle away, it was held the company were responsible for all damage to the cattle during the night; and the fact they were not fed was proper for the consideration of the jury. Illinois Central Railw. *v.* Waters, 41 Ill. 73.

An express company cannot restrict their common-law responsibility, by giving a receipt to the mere servant of the owner of the goods, containing such a condition; certainly not unless there is satisfactory evidence that the owner became aware of, and assented to, the terms of such receipt. Buckland *v.* Adams' Express Co., 97 Mass. 124; s. p. Perry *v.* Thompson, 98 id. 249.

Where the drover sent by the owner of hogs to superintend the transportation of them from Chicago to Boston, after they had been loaded into cars at Suspension Bridge, discovered that the cars were not suitable, and so informed the servants of the company, but said nothing to the superintendent, who was near by, and without further remonstrance suffered the cars to be attached to the train, which was to start for Albany in ten or fifteen minutes, and went to the ticket office to procure a pass; and on securing the same, was presented with a written contract, and told that he must sign it with the name of his employer, which he did, without express authority from him, and without knowing its contents, supposing it to be some contract about the hogs which the manner of doing the business required him to sign; it was held, that the drover, under the circumstances, must be regarded as representing the owners in the matter of the transportation, and that his contract therefore bound them. A large number of the hogs died from suffocation, in consequence of the defectiveness of the very cars objected to by the drover, and which the servants of the company insisted were amply sufficient, and such as the company had always used. The drover did all he could on the passage to afford the animals suitable air, and to relieve their distress in other respects, and at Rochester informed the station agent that they were in danger of being killed, and urged that they should be loaded into other cars; but the agent said they had no other cars, and the animals were not in fact suffering as supposed or represented, and they were carried through to Albany,

where forty or more were found dead. The writing was a formal agreement, *inter partes*, signed by the station agent as such, and by the drover with the name of the owner. It provided, that where the company transport live stock at the reduced rates charged in the present case, they should not in any event be held responsible beyond a certain amount for any single animal, and the owner agrees to take the risk of injuries from "heat, suffocation, or being crowded;" and to examine the cars, and to take all risk of injury from any defect in the same; and to send some person to superintend the transportation. The court held the contract binding upon the owners, and that it exonerated the company from responsibility for the loss. Squire *v.* The New York Central Railw., 98 Mass. 239.

But a contract exempting the company from responsibility for loss or damage to live stock in "loading, unloading, conveyance, and otherwise, whether arising from negligence, misconduct, or otherwise," was held not to extend to any deficiency in the carriages, or injury from any source except those enumerated or one of similar character. Hawkins *v.* Great Western Railw., 17 Mich. 57.

In a case in Georgia, Purcell *v.* Southern Express Co., 34 Ga. 315, the familiar propositions were reaffirmed, that a receipt given for freight received, and specifying the terms on which it was to be carried, might be explained by proof of a special contract between the shipper and the carrier. But it was also held that no special contract will excuse the carrier for losses caused by his own neglect. If the carrier fails to deliver, the burden is upon him to show a valid excuse.

If cotton, on its arrival at its destination, is left upon a side track, within ten feet of the main track, exposed to be ignited by sparks from the passing engines, the carrier will be responsible for consequences. Ib.

The owner of freight has the right to stop it at any point, or to alter its destination; but if it be carried upon a special contract, the carrier has a right to freight already earned, before he gives the goods a new destination. Withers *v.* Macon & Western Railw., 35 Ga. 273.

When responsibility begins.

The responsibility of the carrier does not attach until the goods are so far committed to his custody, or that of his agent, as to require to be cared for by him, and that this be done with his knowledge and consent. Grosvenor *v.* New York Central Railw., 39 N. Y. 34.

New destination given goods.

The consignor may alter the destination of the goods while *in transitu*, and if the consignee have obtained no constructive possession. Strahorn *v.* Union Stock Yard & Transit Co., 43 Ill. 424.

Damages.

In Cushing *v.* Wells, Fargo & Co., 98 Mass. 550, the court held the carrier responsible for the failure to deliver gold coin, received for transportation, for the value of the coin in legal-tender notes, treating the coin as a commodity, which it had refused to do in an action of contract payable in coin. Wood *v.* Bullens, 6 Allen, 516; Bush *v.* Baldrey, 11 Allen, 367. The distinction is rather nice, although just, and was dissented from by Mr. Justice *Hoar*. The recent decision of the United States Supreme Court is a virtual reversal of the former rule, and renders the distinction unimportant.

Termination of carrier's responsibility.

Does not terminate after the arrival of the goods at the place of destination, until they are unloaded, and put into a reasonably safe and suitable place for their reception by the consignee, if they are not delivered to him at once. Rice *v.* Boston & Worcester Railw., 98 Mass. 212.

The usage of a port, that in order to constitute the delivery of goods by carriers by water a receipt must be given for the same by the consignee or his agent, is a bad usage, and not binding upon the owner of the goods, or admissible in defence of an action against the consignee for loss of the goods through his negligence. Reed *v.* Richardson, 98 Mass. 216.

Where the carrier charges for delivering the goods at a particular place beyond the termination of his route, he is responsible, as such, for the safe delivery at that place. Baltimore & Ohio Railw. *v.* Green, 25 Md. 72. The right of railway companies to enter into such contracts, and to own steamboats for that purpose, is ably discussed and maintained in Wheeler *v.* S. F. & A. Railw. 31 Cal. 46.

The rule of law stated in the text, *ante*, vol. 2, p. 69, and in Moses *v.* Boston & Maine Railw., 32 N. H. 523; Smith *v.* Nashua & Lowell Railw., 7 Foster, 86, is affirmed in Jeffersonville Railw. *v.* Cleveland, 2 Bush, 468.

In a recent case, Morse *v.* Brainerd, 41 Vt. —, where the plaintiff shipped cattle on the Vermont & Canada Railway, under the control and management of the defendant, as receiver in chancery of the Vermont Central Railway, to be transported across the two roads in the control and management of the defendant; and also over connecting roads in New Hampshire and Massachusetts, and to be delivered at Medford, near Boston, all the roads being connected in the transportation, and dividing the freight according to a rate fixed by themselves, but not forming a strict partnership, so far as appeared; the defendant was held responsible for any damage happening upon the connecting lines, on the ground of an implied contract to deliver at the end of the route. The bill of lading stated that the

goods were to be transported by the defendants from the place of shipment to the place of delivery, and the whole freight to be paid by the consignee at that place.

What is personal baggage.

It has been held in the county courts in England, that a photographic apparatus cannot be regarded as personal baggage. We think it might be so regarded in this country if the passenger had no other.

Where luggage is left with the carrier after its arrival at the termination of the route, whether with or without special arrangement, the carrier's responsibility, as such, terminates, and he is only responsible as a warehouseman, and not for its destruction by fire, without his fault. Jones *v.* The Norwich & New York Transportation Company, 50 Barb. 193.

Deficiency of trains and other accommodations. — The agency of Congress the only hopeful remedy.

Where the statute required railways to run a sufficient number of trains to accommodate the business on the line, and gave the courts of equity power, on petition of any party interested in the provision, to appoint commissioners to settle any disagreement as to what may be considered such reasonable accommodation; and also provided that "said court is hereby invested with full equity powers to enforce the provisions of this act," it was held the court had no jurisdiction in equity, upon the petition of such persons, to compel the running of such trains. The court considered that a party interested only in common with the general public, could not properly represent that interest, but that the Attorney General would be the most proper party to move in such a proceeding. But the terms of the statute in allowing "any person interested in the transportation of freight or passengers" along that line to petition the court, would seem a sufficient indication of the right of such party to pursue the matter to final judgment, since it would afford no relief to determine the controversy between the claimants and the company, unless the decision of the commissioners could be enforced by the court in the same proceedings, and without resort to a new action. It is just this kind of technical refinement, and disposition, in the courts to escape from interfering with the railway management of the country as long as that is practicable, which renders it so difficult to effect any system in regard to the matter. We are not much surprised that such a feeling of reluctance exists in the courts, in order to escape labor and responsibility, enough of which they commonly have already. But there must be something done upon this subject speedily, or the country will become a serious sufferer, in many ways. There should, unquestionably, be some way devised, either by the action of Congress or the State legislatures, or by the concurrent action of both, to establish some Commission of sufficient ability, and with adequate powers, to control the entire

subject throughout the country. But this will never be done by the assent of the railways. They will prefer to be as independent of extraneous control as possible. It must be effected by some general, national system of legislative and judicial control. And this seems impossible to be effected, except by the legislative action of Congress, in order to establish system, and the enforcement of it through the agency of the national courts. This is the only mode of procuring the creation and enforcement of one uniform system throughout the entire country. A uniform national system of railway control and management, once established by the concurrent action of the state legislatures, which it would be next to impossible to effect, could not be used one month without exhibiting practical defects, such as to ruin the whole operation, unless speedily remedied. If the remedy were left to judicial construction alone, throughout the several state courts, we should speedily have as many systems as courts. It would, of course, be altogether hopeless to effect any amendments by the concurrent action of forty state legislatures. It seems certain, therefore, that we must either have a national system of supervision of railways through the action of Congress and the national courts, or else surrender it wholly to the railways themselves. The present state of these matters in the state of New York shows pretty clearly what we are fast coming to throughout the country, unless some speedy and efficient remedy is applied.

As to what amounts to contract to deliver at a specified time, see Wallace *v.* Great So. & Western Railw., 17 W. R. 464.

Goods not arriving in time.

The defendant was a carrier of freight by a steamboat, making daily trips between Bridgeport and New York, and was accustomed to carry dressed poultry for the plaintiffs, who were dealers in that article, and who lived on a railway running into Bridgeport. It was their custom to send their poultry packed in boxes by railway in season for the boat, to be forwarded by the agents of the railway per the boat, unless there was reason to fear that the boat would be detained, and, in that case, per the New York railway; and, in several cases, where the boat had been detained, the agent of the steamboat had transferred the poultry to the railway for the evening freight train to New York. A quantity of poultry was sent by the plaintiffs by railway, and delivered on board the boat on the 13th of May, packed in ice, and directed to a certain poultry dealer in New York, and a receipt taken for it, stating the contents, and signed by the clerk of the boat. The delivery was in season for the boat of the 13th, but that was detained by a fog, and did not sail until the 15th. The delay was unavoidable. No care, however, was taken of the poultry by the persons in charge of the boat; and, in consequence, the

ice melted, and the poultry was injured. *Held*, that the defendant was liable. Peck *v.* Weeks, 34 Conn. 145.

It affords no excuse in such cases, that the carrier signed the receipt without examination, and had no actual knowledge of the contents of the boxes. Ib.

Stoppage in transitu.

Goods shipped by the consignor, on board a ship chartered by himself, to the consignee, at his risk, and subject to his order, and the bill of lading indorsed to and received by him, and the ship having arrived at an intermediate port, and applied to the consignee, for instructions as to the port of destination, are not beyond the reach of the right to stop *in transitu* by the unpaid vendor. Fraser *v.* Witt, 17 W. R. 92.

It was held by the Judicial Committee of the Privy Council, in Rodger *v.* The Banks, &c., 17 W. R. 468, that the forbearance or release of a pre-existing claim is not a sufficient consideration for the transfer of a bill of lading, so as to defeat the right of stoppage *in transitu*. But the opinion is not delivered by one of the law members, and does not seem to be placed upon the ground assumed by counsel, Sir Roundell Palmer, and is probably not law, upon the ground stated in the note, certainly not to the extent stated.

But an assignment of the bill of lading for the purpose of securing the assignee for accepting a bill of exchange concurrently drawn, will not entitle the assignee to take possession of the goods, if he refuse to accept the bill. Shepherd *v.* Harrison, 17 W. R. 609; s. c. affirmed in Exch. Chamber, id. 770.

Baggage.

The stat. of the U. S. 1851, c. 43, § 2, exempting masters and owners of sea-going vessels from liability as carriers, for the loss of bank-bills, coin, jewelry, precious metals, and precious stones, shipped and laden without notice to them, and entry on the bill of lading of the true character and value of the same, does not apply to their contracts for the carriage of passengers with their luggage. Dunlap *v.* International Steamboat Co., 98 Mass. 371. But in such case the carrier is not responsible for money beyond an amount sufficient for the reasonable travelling expenses of the passenger, if delivered in his valise, and received as luggage, without notice that the contents are more than ordinarily valuable. Ib.

And the carrier is not responsible for money of one passenger in a valise, which another passenger, with the knowledge of the first, delivers as his own luggage, and which is received by the carrier as such. Ib.

The owner of a valise, containing samples of merchandise, and which he intrusted to an agent for the purpose of making sales, cannot recover

for the same of a railway company, to whom the agent delivered it as his own personal luggage, for transportation under a ticket purchased by the agent, without adducing proof of gross negligence on the part of the company. Stimson *v.* Conn. River Railw., 98 Mass. 83 ; s. p. Miss. Central Railw. *v.* Kennedy, 41 Miss. 671.

COMMON CARRIERS OF PASSENGERS.

Degree of care required.

Carriers of passengers by steamboat must see to it, that a small boat, hanging over the deck of the steamboat, is so fastened as not to fall in consequence of any cause (including careless and irregular acts of other passengers) which may be reasonably anticipated. Simmons *v.* New Bedford, &c. Steamboat Co., 97 Mass. 361. Railway companies who carry passengers in the caboose car, attached to the freight trains, and receive fare of them, the same as in passenger trains, incur the same responsibility for their safety as in other cases. Edgerton *v.* New York & H. Railw., 39 N. Y. 227.

Contributory negligence.

A railway passenger cannot maintain an action against the company for a personal injury sustained by him, in consequence of his voluntarily and unnecessarily standing upon the platform of a passenger car, while the train is in motion. Hickey *v.* Boston & Lowell Railw., 14 Allen, 429.

And it will make no difference that this was done in conformity with a general practice, by express permission of the conductor and brakeman, and without objection from the superintendent and directors, who knew of the practice. Ib.

So, too, one that is injured by attempting to leave, or to go upon a passenger train while in motion, cannot recover. Gavett *v.* Manchester & Lawrence Railw., 16 Gray —. See also Balt. & Ohio Railw. *v.* Breinig, 25 Md. 378.

The Irish courts persistently hold that to defeat the action, plantiff's contributory negligence must be such that the defendant, with ordinary care, could not avoid doing the damage. Doyle *v.* Kinahan, 17 W. R. 679.

Time of departure of passenger trains.

The company, by advertising the time of departure of passenger trains, and selling tickets for such trains, impliedly bind themselves that the trains shall leave at the times named, with the qualification of the right

to change the time of departure, upon giving reasonable notice. Sears *v.* Eastern Railw., 14 Allen, 433.

But where the company advertise the time of their trains in the public newspapers, and sell tickets by the package to persons who buy in faith of the trains keeping the time thus advertised, they will be responsible in damages to the purchasers, where they alter the time of the trains, and give no other notice of it, except by handbills posted in the cars and at the stations; and it will make no difference, that the company are able to show, on their part, a usage for several years, to make occasional changes in their time-tables, in regard to certain trains, with no other notice than as above stated. Ib.

Where a person ran her foot against a weighing machine upon the platform, and suffered damage, held not entitled to recover. Blackman *v.* London B. & S. C. Railw., 17 W. R. 769.

A passenger who falls out of a railway carriage in attempting to shut the door, when it flies open and causes him inconvenience only cannot recover for any injury. Adams *v.* Lancashire & Yorkshire Railw., 17 W. R. 884. But where the guard shut the door on plaintiff's fingers, company held responsible. Fordham *v.* L. & B. & S. C. Railw., id. 896.

Lost baggage.

Carriers not responsible for several watches, or women's dresses carried in a man's trunk, or for expense incurred in searching for the lost baggage. Miss. C. Railw. *v.* Kennedy, 41 Miss. 671.

Fare prescribed by city ordinance.

The fare prescribed by the city ordinance of Boston for hackney coaches, for the transportation of passengers, includes compensation for time and trouble in going after the passenger, as well as in carrying him. Commonwealth *v.* Duane, 98 Mass. 1. In such case, the ordinance makes it illegal for the owner or driver of such coach to contract with passengers for compensation beyond the sum fixed by the ordinance. Ib.

Injury at station in consequence of displacement of switch, and passengers running in wrong direction by reason of fright.

Passengers are not chargeable with want of care for standing upon the platform in front of the station, while a passenger train approaches, especially when such is the common usage at such station, and it is for the jury to consider whether such usage is not known and permitted by the company. Caswell *v.* Boston & Worcester Railw., 98 Mass. 194. It might fairly be said in such cases, that if the company do not deem it safe for passengers to be upon the platform at such times, or for any other reason

do not desire it to be so, they should not allow passengers to pass out of the station until after the arrival of the train. This is the uniform practice upon the Continental railways in Europe.

And it was held in the same case, that where the passenger became justly alarmed and excited by the approach of the train, in an unexpected direction, by reason of the displacement of the switch through the fault of the company, and having reason to believe by the conduct of the servants of the company, and of the passengers on the platform, that she was in imminent peril therefrom, and in running to escape the apprehended peril, fell and was injured, she was entitled to compensation from the company, although the course she ran exposed her to greater peril, and the immediate cause of her fall was her tripping upon the rail of the track.

Where the plaintiff's arm was broken by being placed in a car window so far outside of the carriage as to come in contact with another car upon another track, it was held he was guilty of such negligence on his part, that he could not recover of the company, and that it was the duty of the court so to decide as matter of law. Pittsburgh & Connellsville Railw. *v.* McClurg, 56 Penn. St. 294. The case of New Jersey Railw. *v.* Kennard, 21 Penn. St. 203, is here overruled.

It is negligence in a street car driver to bring his car partly to a stand and then start up suddenly, without notice, when a passenger is about to leave the car, and if injury occurs to the passenger in consequence, the company is responsible. Nichols *v.* Sixth-Avenue Railw., 38 N. Y. 131.

Passengers refusing to pay fare can only be ejected from the cars at regular stations, by the statute of Illinois; but if one is put out at a point two miles from the regular station, with no circumstances of indignity, and merely because he declined to pay fare, he can only recover nominal damages, and a verdict for $450, in such a case will be set aside as excessive. Chicago & Alton Railw. *v.* Roberts, 40 Ill., 503. And the rule of putting passengers off at regular stations applies where they are carried upon freight trains. Illinois Central Railw. *v.* Sutton, 42 Ill. 438. And where the passenger is put off the train because he did not purchase a ticket before entering it, and when he offered to pay fare to the conductor, and the ticket office was closed at the time the passenger first learned of the necessity of procuring a ticket, he may recover of the company for being put off at a point away from the regular stations, and it would seem should recover something more than nominal damages. Ib. The wilful refusal of a passenger to buy a ticket when he knew it was required, and an absolute refusal to pay fare at all, must be regarded as equal offences against the regulations of the company. Ib. s. p. Chicago & N. W. Railw. *v.* Peacock, 44 Ill. —.

Passenger carriers cannot, after having allowed a passenger to enter their cars, justify expelling him upon the ground that he offers his fare in legal-

tender notes and not in coin, however they may be justified in requiring fares at their stations to be paid in coin. Tarbell *v.* Central Pacific Railw., 34 Cal. 616. If in such case the passenger is ready to pay his fare when demanded by the conductor, he is in time, and may justly require to be carried to his destination. Ib. In such case, where no special damages were alleged and the passenger was put out of the train about five miles from where he entered, and about twelve miles from his destination, $500 was regarded as exorbitant damages, and it was held that $100 was ample compensation, and that unless that were accepted a new trial would be awarded. The plaintiff may show his situation in life, and that of his family, in cases of personal injury, in order to enable the jury to estimate damages. Winters *v.* Hannibal & St. Jo. Railw., 39 Mo. 468.

The question whether passenger carriers are bound to have carriages which are absolutely safe and sufficient, or only to do the utmost in their power by diligence and skill, to have them safe, was considerably discussed in Readhead *v.* The Midland Railway, Law R. 2 Q. B. 412, and the majority of the court held the latter sufficient, while *Blackburn*, J., considered the carrier of passengers is under obligation to provide at his peril a vehicle in fact reasonably sufficient for the journey, and that he is responsible for the consequences of any insufficiency, though arising from a latent defect. But *Mellor & Lush*, JJ., the case having been originally tried before the latter, held that the carrier in such cases is not liable to the passenger for the consequences, if the defect was of such a nature that it could neither be guarded against in the process of construction, nor discovered by subsequent examination. This case was affirmed in the Exchequer Chamber upon the ground stated above. 17 W. R. 737.

In Knight *v.* The Portland, Saco & Portsmouth Railw., 56 Me. 234, not yet published, will be found a very satisfactory opinion by Chief Justice *Appleton*, embracing the following points. Coupon tickets over distinct lines of railway, issued by one line for a passage over the whole, are to be regarded as "distinct tickets for each line." The rights of the passenger and the responsibilities of the companies are the same, "as if the purchase had been made at the ticket office of the respective lines." — "Passenger carriers are bound to exercise the strictest care consistent with the reasonable performance of their contract of transportation." To render them liable it is enough if the injury was caused solely by any negligence on their part, however slight, or if "by the exercise of the strictest care and precaution, reasonably within their power, the injury would not have been sustained."

In such case, where there is a change of cars, or from cars to steamboat between the different lines, each preceding company is responsible for the safety of the passenger until he reaches the line of the next company, so that he comes under the shield of the responsibility of that company. And where a railway company carrying passengers to a steamboat line, uses the

wharf for its baggage train, and directs the passengers to use it for reaching the steamboat, it is responsible for the safe condition of the wharf for such use, and where a passenger was injured in passing from the railway train across the wharf to the steamboat, by stepping her foot into a hole in the planking, the railway is responsible.

In an action to recover damages for an injury sustained by the plaintiff, while a passenger on the cars of the defendant, upon its railway, it appeared that the cause of the accident, and of the injury to the plaintiff, was a broken rail, which threw the car off the track, and that a train from the opposite direction had passed over the spot only a short time previous, and that there had been no examination of the track between that time and the time of the accident. *Held*, that the plaintiff should have been allowed to go to the jury upon the question whether the iron rail was not broken before the train on which he was a passenger came upon it; it being clearly a question for the jury to determine, whether the broken rail was in a sound condition at the time such train came upon it. McPadden *v.* N. Y. Cent. Railw. 47 Barb. 247.

If the evidence of the defendant, in such case, though tending to show that the rail was in a safe and sound condition, and that it broke under the train on which the plaintiff was riding, does not prove that fact conclusively, it should be left to the jury to draw the inference. Ib.

The rule is now established in this state, that a common carrier of persons is bound to provide road-worthy vehicles, irrespective of any question of negligence. Ib.

The principle of this rule would require the carrier who furnishes his own road, and has secured to him the exclusive possession and control of it, to provide a vehicle-worthy road; that is, a road adapted to the safe passage of the vehicle used, over it — a road of continuous unbroken rails for each and every train to enter upon in its passage over the road. Ib.

Strictly speaking, the rail is no part of the vehicle, though in some sense it may be said to be so. The rail, however, is clearly a part of the machinery by which the vehicle is operated, and falls directly within the principle. Ib.

Injury where death ensues.

The implied contract of a railway company to carry a passenger safely, includes the duty of giving him a reasonable opportunity to alight in safety. Fairmount, &c. Passenger Railw. Co. *v.* Stutler, 54 Penn. St. 375.

At law, a mother has no implied right to the services of her minor child, she not being bound for his maintenance. Ib.

The relation of mistress and servant can be constituted between mother and child, only as it may be done between strangers in blood, except that less evidence might establish it. Ib.

The mother's right to an action for injury to her child cannot be rested on her liability for his support under the poor laws. Ib.

Actions by parents or master for seduction, &c., *per quod servitium amisit*, are founded in pure wrong upon the rights of the master in the person of the servant, for which trespass or case will lie. Ib.

For torts springing from contract which consist in a mere omission of a contract duty, no legal remedy exists except by an action on the case; which must be by the party injured, and cannot be by the master. Ib.

A minor may contract for his own benefit, and as this power is limited to his necessities and advantages, his contracts cannot accrue to the benefit of another. Ib.

A minor having no father, but living with his mother, and by his labor contributing to her support, was a passenger on a railway car and paid his fare. He was injured by the negligence of the company's servants, and was provided with medical attendance, nursed and supported by his mother. *Held*, that the contract to carry safely was with the minor; that the mother was a stranger to it, and she could not recover for the injury. Ib.

The act of April 26, 1850, expressly gives the widowed mother power to recover damages for the death of a child by negligence — the damages are not limited to nursing and medical attendance but are such as a court and jury under all the circumstances shall consider reasonable. Penn. R. Co. *v.* Bantom, 54 Penn. St. 495.

Either of the parents is entitled to recover damages estimated by a common standard, — the father first, and after his death the mother. Ib.

The mother may show what the services of a child were worth to her, as if she had acquired right to them by contract. Ib.

Nursing, medical attendance, and funeral expenses are proper elements of estimate, but the value of services lost is equally legitimate since the statute. Ib.

In an action for death, by negligence, the proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be recovered, without any *solatium* for distress of mind; and that loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the rest of his life, and which would have gone for the benefit of his children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure. Penn. Railw. *v.* Butler, 57 Penn. St. 335.

If improper evidence, tending to inflame damages has been given, and it has not been struck out at or before the close of the testimony, so that counsel shall not be allowed to refer to it in their address to the jury, it is too late to cure it by directing the jury, in the charge, to disregard it. Ib.

The Connecticut statute of 1853 (Revision of 1866, page 202) provides that, where the life of a passenger is lost by reason of the negligence of a railway company, the company shall be liable to pay damages, not over five thousand dollars, nor less than one thousand dollars, to the use of the executor or administrator, to be recovered by him in an action on the statute for the benefit of the husband or widow and heirs of the deceased. *Held*, that this act, whether viewed as regulating an old action, or as giving a new one, takes away the right of an executor or administrator to sue for the injuries or death of his intestate for the benefit of the estate generally.

The essential elements of the cause of action given or regulated by statute are, the injury, the negligence, and the consequent death; and until all have happened, the cause of action is not complete, and the statute of limitations does not begin to run upon it. Andrews *v.* Hartford & New Haven Railw., 34 Conn. 57.

In an action against a railway company, the declaration alleged that the death for which the suit was brought, was caused by negligence in *not allowing a safe and convenient platform or way, and sufficient time to get into the cars which killed the deceased. Held*, that delay in the arrival of train in which the deceased was to go not being alleged in the declaration, was not a cause of action, but was a circumstance bearing on the question of negligence. Penn. Railw. *v.* Henderson, 51 Penn. St. 315.

On the question of negligence, evidence was proper that the next day after the accident the agent of the company telegraphed to the superintendent that the platform should be removed, and it was removed. Ib.

The right of action which a wife has for the death of her husband, caused by negligence, is different from that which would have accrued to him, had he survived the injury, and excludes all questions of exemplary damages, the damages being simply compensatory for the loss sustained by the surviving family. Ib.

Death contributed to by party's negligence.

Where the death is, in any way, contributed to by the party's own default, no one can recover damages on account of it. Rowland *v.* Cannon, 35 Ga. 105.

The operation of the New Jersey statute, in this class of cases, is not restricted to cases where the deceased leaves a widow. By a liberal and remedial construction, its operation is extended to maintaining an action in the name of the personal representative for the benefit of the next of kin. Haggerty *v.* Central Railw., 2 Vroom, 349.

Punitive damages.

Passenger carriers cannot be subjected to punitive damages, unless in clear cases of gross negligence or wanton injury. Bannon *v.* Baltimore & Ohio

Railw., 24 Md. 108. The rule is here somewhat elaborated. Otherwise, they should be merely compensatory, so as to leave the party entitled to the benefit of the action as well off as if the deceased had obtained the ordinary continuance of life, with common success. Baltimore & Ohio Railw. *v.* State, id. 271; Same *v.* Breinig, 25 id. 378.

The owners of cattle who are allowed to pass without paying fare not carried gratuitously.

A drover transporting live stock in the cars of a railway company, for which he paid freight, received a ticket to "pass the bearer in charge of his stock," on which was indorsed: "The person accepting this free ticket assumes all risk of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether by the negligence of their agents or otherwise, for any injury to the person using this ticket." *Held*, that the drover was not a gratuitous but a paying passenger. *Held*, also, that the indorsement was no excuse for negligence. Penn. Railw. *v.* Henderson, 51 Penn. St. 315.

In an action for damages for death occasioned by negligence, whether a given state of facts constitutes negligence is generally a question of law, but whether a particular negligence contributed to the catastrophe is a question of fact. Catawissa Railw. Co. *v.* Armstrong, 52 Penn. St. 282.

The obligation of a wife whose husband has been killed by negligence to support herself and children, and the loss of her chance to be endowed out of his future accumulations are pecuniary injuries to her, to be redressed by the person who caused them. Ib.

In such case, there can be no fixed standard for estimating damages, except the discretion of the jury properly instructed. Ib.

Contributory negligence in case of a child.

A child of tender years, for the purpose of protection, was taken into the arms of a person to whose care she had not been intrusted, and by the negligence of such person was injured by an engine. *Held*, that such negligence was not contributory negligence so as to discharge the railway company, their servants having also been negligent. N. Penn. Railw. Co. *v.* Mahoney, 57 Penn. 187.

If there is no evidence of such negligence on the part of the plaintiff, the court should not submit that question to the jury, or give any instructions upon it. Winters *v.* Hannibal & St. Jo. Railw., 39 Mo. 468.

Reasonable rules and regulations of company.

A railway company has the right to require a passenger to purchase his ticket, and present it when demanded, as evidence of his title to a seat, and

the conductor is justified in compelling him to leave the cars, whenever he refuses so to do. Baltimore & Ohio Railw. *v.* Blocher, 27 Md. 277.

Passengers being obliged to conform to the regulations prescribed by carriers, so far as to enable them to avoid imposition, a corresponding duty is imposed upon the latter to show all becoming courtesy towards the former, in demanding the evidence of their compliance with such rules. Ib.

The conductors and employees of a railway company, being in the line of their duty in collecting the fare, or taking up tickets from passengers, represent the company, and the company is therefore liable for any abuse of their authority, whether of omission or commission. Ib.

Statement of the company's agent as to condition of freight.

The statements of the general freight agent of a railway company as to the condition of goods delivered to him for transportation, made while the goods are in transit, or the duty of carriers still continues, are admissible in evidence against the company, although made eight months after the goods were so delivered to him. Burnside *v.* Grand Trunk Railw. Co., 47 N. H. 554.

TELEGRAPH COMPANY.

Is not responsible for errors in unrepeated messages, where it has given notice that it will not be so liable, and is not guilty of gross negligence. Wann *v.* Western, &c. Tel. Co., 37 Mo. 472.

Where one company receives a message, to be transmitted over another company's line beyond their own, upon a printed form, one of the conditions of which is that it will not be responsible for the default of any other company over whose line messages may have to pass in reaching their destination, or for any delay in the delivery or transmission, this condition will not apply to any other company except the one to whom the message is delivered; and where the message failed to be delivered in time, through the neglect of another company, it will be responsible for all damages suffered in consequence. And where the message was for the acceptance of an offer to sell goods, which the sender failed to obtain in consequence of the delay in transmission, the company will be responsible for the difference between the price at which the goods were offered and that at which they could, by the use of due diligence, have been procured at the same time and place. Squire *v.* The Western Union Telegraph Co., 98 Mass. 232.

The responsibility of a telegraph company for not sending a message correctly, is one of contract with the sender, and he alone can maintain the action. Playford *v.* United Kingdom Tel. Co., 17 W. R. 968.

Telegrams not sufficient to take case out of statute of frauds, by reference to void contract.

Telegrams signed by a person, and relating to a contract, but not mentioning the subject-matter thereof, are not sufficient to take the contract out of the statute of frauds; nor can this deficiency be supplied by referring, for a description of the subject-matter, to a written instrument subsequently signed by the same person, and designed to put in form the same contract, if such written instrument is void as a contract, by reason of having been executed in violation of the statutes for the observance of the Lord's day. Hazard *v.* Day, 14 Allen, 487.

EQUITABLE INTERFERENCE IN REGARD TO RAILWAYS.

A court of equity will not ordinarily decline to enjoin a nuisance upon the ground of the difficulty of removing the same, short of physical impossibility. Attorney-General *v.* Lunatic Asylum, 17 W. R. 240.

Parties to bill to enforce lien for land damages.

Where one company is operating the line of another company, the former is a proper party to a bill brought to enforce such a lien. Marling *v.* The Stonehouse & Nailsworth Railw., 17 W. R. 484. Goodford *v.* Same Co., id. 515.

Equitable mortgages.

The directors of a joint-stock company having power to create a mortgage in a prescribed mode, cannot create an equitable mortgage by the deposit of title deeds, although done by substantially the same authority as that required by the organic law of the corporation to create a mortgage. *In re* The Provident Insurance Co., 17 W. R. 514.

TAXATION.

Contrary to the United States constitution.

A law for revenue, laying a distinctive tax on the business of foreign corporations habitually doing business in this state, such business consisting of the transportation of goods *in transitu* from state to state, and the tax being graduated by the weight of the goods and the number of the passengers carried, is an infringement of the clause of the constitution of the United States giving to congress the regulation of commerce between the several states.

Such tax, though in form on the business of the companies, is in sub-

stance a tax on the commodities, the transportation of which constitutes such business.

Whenever the taxation of a commodity would amount to a regulation of commerce within the prohibition of the constitution, so will the taxation of an inseparable incident or necessary concomitant of such commodity.

A state cannot tax a foreign corporation on a principle different from that in which she can tax one of her domestic corporations.

The power to refuse a recognition of corporate existence, does not involve the right to tax a foreign corporation at the arbitrary discretion of the government possessing such power.

The act of taxation is the recognition of the legal status of the corporation taxed, and admits that such corporation is clothed with all the rights necessary to defend itself against illegal taxation. Erie Railway *v.* State of New Jersey, 2 Vroom, 531.

The legislature may exempt existing and future railways in the state from taxation for a term of years. Southern Railw. *v.* City of Jackson, 38 Miss. 334. But such exemption will be subject to repeal, unless it form part of the charter of the railway at the time of its grant. Ib.

Exemption from taxation.

The charter of the Morris & Essex Railroad Company subjects the company to a tax of one and a half per cent. on the cost of the road, as soon as the net proceeds shall equal seven per cent., and provides that no other tax shall be levied upon the company. By the terms of the charter, it may be altered or repealed by the legislature. The subsequent general tax law of 1862 subjected to taxation the real estate of all private corporations, "except those which by virtue of any irrepealable contract in their charter or other contracts with the state are expressly exempt from taxation;" and it repealed all acts, whether special or local, inconsistent with its provisions. *Held*, that the tax law of 1862 repealed the provisions of the charter in regard to taxation, and that the assessment made upon the real estate of the company in the township of Morris was rightfully made under the general law.

"No irrepealable contract" can result from provisions in a charter which is made in terms subject to alteration, amendment, or repeal by the power granting it.

When the right to alter or amend a charter whenever the public good may require, is reserved, the legislature is the proper tribunal to determine when the right shall be exercised. Morris & Essex Railw. *v.* Miller, Collector of Morris, 2 Vroom, 521.

Same doctrine adopted in Jersey City & Bergen Railw. *v.* Jersey City, id. 575.

For purposes of taxation, wood, timber, logs, and lumber owned by a railway corporation, and distributed along its line for present use in operating and repairing such road, are to be deemed a part of the railway, and subject to be taxed in that form by the justices of the Supreme Judicial Court. Fitchburg Railw. *v.* Prescott, 47 N. H. 62.

And, therefore, such articles cannot be lawfully taxed in the towns where they may happen to be, although exceeding in value the sum of fifty dollars. Ib.

RAILWAY INVESTMENTS.

Remedies by bondholders and mortgagees.

Statutory liens take effect at the time the liability is incurred, and do not include property not then owned by the company. Bath *v.* Miller, 53 Me. 308.

When a railway company, by virtue of a special act of the legislature, mortgaged to the plaintiffs all the property then owned by both the new and the old portions of the road: *Held*, that wood subsequently purchased with the earnings and for the use of the whole road, would not pass by said mortgage, and is attachable. Ib.

If the mortgagee of wood, attached as the property of the mortgagor, replevy the same from the attaching officer, and permit it to go back into the possession of the mortgagor, who burnt it with the knowledge and consent of said mortgagee; the mortgagee thereby waives all lien held by virtue of the mortgage. Ib.

A mortgagee of railway property may be restrained by injunction from removing or making sale of portions of the property, notwithstanding the acknowledged inadequacy of the security. Lane *v.* Baughman, 17 Ohio N. S. 642. The proper remedy for the mortgagors in such case is to proceed to make a foreclosure of the whole in equity. Ib.

Money advanced to a railway company, and by them applied to the completion of their works and otherwise for their benefit, although obtained in excess of their powers, and after their borrowing powers were exhausted, nevertheless constitutes a debt against the company, and the person so advancing money is entitled to the avails of the sale of the company's works in preference to shareholders. *Re* Cork & Youghal Railw., 17 W. R. 873.

A railway corporation and a portion of its stockholders cannot join as co-complainants in a bill to redeem the road from a mortgage, there being no allegation that the defendant corporation has been guilty of any violation of its trust. K. & P. Railw. *v.* P. & K. Railw., 54 Me. 173.

To constitute multifariousness as respects the subject-matter of a bill, the different grounds of suit must be wholly distinct, and each must be sufficient, as stated, to sustain a bill. Ib.

If they be not entirely distinct and unconnected; if they arise out of one and the same transaction, and forming one course of dealing, all tending to one end, and one connected story can be told of the whole, it is not multifarious. Ib.

All who have been so connected with mortgages of a railway sought to be redeemed, as to render them liable for income under it, should be made parties defendant. Ib.

Hence, when a bill brought against a railway corporation in possession, and a portion of its members to redeem a railway from a mortgage, alleges that all the individuals named as defendants fraudulently combined together in all the transactions set forth in the bill, of which the plaintiffs complain; and that they are all partakers of the income of the road, which should equitably go in payment of the mortgage debt; and the defendant corporation took possession under the mortgage: *Held*, there was no misjoinder of defendant. Ib.

Such a bill must allege that the defendant corporation holds, or has some title in, the mortgage, or must aver information or belief to that effect.

It must also allege a formal offer to pay such an amount as may be found due; and an averment of the demand for an account, "in order that the complainant might pay," and the prayer to be "let in to redeem on payment," &c., is not sufficient. Ib.

When there is no allegation of the commencement of a foreclosure, but there is an allegation that possession has been taken, as under the R. S. c. 51, § 54, and that all claims secured by the mortgage have been paid or have been so purchased that they should in equity be considered as paid, there need be no other allegation of payment, or of an adequate tender of the amount of overdue bonds or coupons. Ib.

A railway company, pursuant to votes of their stockholders and directors, conveyed all their property and franchises to three trustees and their survivors and successors by deed conditioned to be void upon payment of certain bonds issued by the corporation. It was stipulated in the deed that, if the company shall at any time fail to pay the interest or principal of the bonds according to their tenor, the mortgagees may take the mortgaged property into their actual possession, manage and control the same, and apply the net income and proceeds thereof to the payment of such interest and principal. On demurrer to a bill brought by the trustees against the corporation to obtain possession: *Held*, —

(1.) That the mortgage having been ratified by statute, is valid.

(2.) That, whether it was valid prior to such ratifaction, *quære*.

(3.) That this court has jurisdiction to decree a specific performance of the stipulation in the mortgage, authorizing the trustees to take possession of the mortgaged property for non-payment of the bonds; and, —

(4.) That a bill in equity is a proper form of proceeding to obtain it. Shepley *v.* Atlantic & St. Lawrence Railw., 55 Me. 395.

Interest on coupons after maturity.

Where a railway company has no funds at the place at which the coupons on their bonds are to be presented for payment, interest is payable on the coupons after maturity without presentation. North Penn. Railw. *v.* Adams, 54 Penn. St. 94.

Rolling stock not a fixture.

The engines and cars of a railway are not so affixed to the road that they can be called fixtures thereof without introducing a new principle into the law of fixtures. Bement *v.* Plattsburgh & Montreal Railw., 47 Barb. 104.

The rolling stock (engines and cars) of a railway is personal property which can be levied on and sold, as such, under an execution against the company, and will not pass by a deed or mortgage of the railway track or way, by metes and bounds, as parts or fixtures thereof, or as constructively annexed thereto. Ib.

Such rolling stock will not pass by a mortgage of the railway track or way, and a foreclosure and sale, unless the terms of the mortgage are such as to include or convey such rolling stock as personal property. Ib.

A mortgage of a railway and the rolling stock on it, is not so far as it relates to the rolling stock, within the provision or intent of the act of 1833, requiring chattel mortgages to be filed in the town or city where the mortgagor, if a resident of this state, resides, and if not a resident, then in the town or city where the mortgaged property is, at the time of the execution of the mortgage. Ib.

Consequently such a mortgage, though not filed as a chattel mortgage, in pursuance of the act of 1833, and where there has been no change of possession, will not be void as to judgment creditors of the mortgagor, or those claiming the rolling stock under them, on the ground or for the sole reason, that the mortgage was not so filed. Ib.

Special contract may affect the character of fixtures.

"Although iron rails are so fastened upon the road-bed of a railway company as to be part of the realty in the absence of any agreement to the contrary, yet, if the vendor delivered and the company received them under an agreement that they should be laid down on a specified part of the road and remain the vendor's property until paid for, and they have

not been paid for, they continue to be personal property as between the vendor and the company; and also as between the vendor and subsequent encumbrancers, and grantees of the railway who had notice of the agreement when they acquired title; but not as between the vendor and prior mortgagees of the railway or *owners of land over which the railway was located* and the iron was laid, who remain entitled to possession of such land as security for their damages, unless they have consented to said agreement." Hunt *v.* Bay State Iron Co., 97 Mass. 279.

"Land-owners having a lien upon the location for their damages, and a right to take possession for default of payment, stand in same position." Lien created by Mass. Gen. Stat. ch. 63, §§ 33, 34. Per. Foster, J., s. c. Ib.

Rolling stock may sometimes be treated as a fixture.

The doctrine that the rolling stock of a railway company in all cases is to be considered as personal property, and not passing under a mortgage of the road and its appurtenances, not acceded to. Hoyle *v.* Plattsburgh & Montreal Railw., 51 Barb. 45.

When it was found by the referee, and was conceded, that a mortgage of its road and franchise, executed by a railway company, was sufficient to include in the mortgaged property the rolling stock, and the parties intended that the rolling stock, and the equipments of the road, should pass as a part of the road and as necessary to its use; the object of the mortgage being to provide funds for the building of the road and preparing it for travel, and the intent of the parties was to secure the bondholders by a mortgage on the whole property in the road, and used by the company for travel: *Held*, that such a construction should be given to the instrument as to include therein the rolling stock, although not expressly named Ib.

The 28th section of the general railway act (Laws of 1850, p. 211), authorizing railway corporations to borrow money for the building of their roads, or operating them, and to mortgage all their corporate property and franchises to secure the payment thereof, contemplates a mortgage of all the property, whether land, wood, rolling stock, or franchise, and warrants the conclusion that it was the intent of the legislature that the whole should be included in one mortgage, and treated as a mortgage of the road and its accessories. Such a mortgage need not be treated as a chattel mortgage, and filed as such in order to give it validity as against judgment creditors. Ib.

CONSTITUTIONAL QUESTIONS.

A statute of the state legislature affording additional remedy upon railway mortgages, is no infringement of the contract. McElrath *v.* Pittsburg & Steubenville Railw., 55 Penn. St. 189.

How far one company may hold shares in other companies.

The Peruvian Railway Co., 17 W. R. 454.

RAILWAY CONNECTIONS.

This implies such a union of tracks, as to admit the convenient interchange of freight and passengers. Phila. & Erie Railw. *v.* Catawissa Railw., 53 Penn. St. 20.

The effect of the lease of a railway in regard to its assignable character. Ib.

Railways may be connected, although not of the same gauge. Ib.

INJURIES IN NATURE OF TORTS.

One injured at the crossing of a railway and highway is not entitled to judgment upon a special verdict finding that the company were guilty of negligence, unless it also find that he was a traveller or in some way lawfully in the highway. Pittsburg, Fort Wayne & Chicago Railw. *v.* Evans, 53 Penn. St. 250.

AMALGAMATION OF DIFFERENT COMPANIES.

This requires special statutory powers, and if it is attempted without the requisite powers, it is proper for all the shareholders to join in a bill to set it aside. Clinch *v.* Financial Company, 17 W. R. 84.

Where a contract for amalgamation fails as being *ultra vires* of the companies, all ancillary contracts incidental to it must fail with it. *Re* London & Northern American Co., id. 751.

DEFENCES NOT ALLOWED AGAINST NEGOTIABLE BONDS.

A railway company entered into a contract for finishing their road in a specified time, and in accordance with its terms delivered their coupon bonds from time to time to the contractor as the road progressed; the road having been finished, but not within the time specified, it was held that they were estopped from setting up a claim for damages for the delay of finishing against holders of the bonds who had received them *bona fide* from the contractor. McElrath *v.* Pittsburg, &c. Railw., 55 Penn. St. 189.

ARRANGEMENTS BETWEEN DIFFERENT RAILWAYS.

A contract by the owners of a railway to be made under an act of incorporation with the owners of a rival railway, not to continue such road beyond a certain point, is void as contravening public policy.

Such a contract does not affect a prior agreement between the owners of such road, who also owned another railway adjoining the latter, to divide the through fares of passengers on such continuous road in a certain proportion; although the former contains a provision to deduct an additional sum monthly from such through fares as a consideration for entering into such new illegal contract; and such through fares must be divided as though such second and illegal contract had never been made.

The division of the through fares of passengers upon a connected line of railway, consisting of two adjoining roads, owned by different companies, according to certain regulations, for six years, without objection, creates, by construction, a modification of any former contract in conflict therewith, and becomes binding upon the respective parties, until annulled or suspended by a new contract. Hartford & N. H. Railw. *v.* N. Y. & N. H. Railw., 3 Rob. 411.

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