THE

LAW OF RAILWAYS:

EMBRACING

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

BY

ISAAC F. REDFIELD, LL. D.,
CHIEF JUSTICE OF VERMONT.

THIRD EDITION, GREATLY ENLARGED.

VOL. II.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1867.

University Press: Welch, Bigelow, & Co.,
Cambridge.

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 original paging is preserved in this edition at the bottom of the page.

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(8.) Should the commonwealth go forward and finish the road and put it in operation, and equity allow other parties to redeem, they would probably be required to repay all such expenditures 703
(9.) But one case of railway mortgage foreclosure in this state . 703

NOTE II. TO §§ 235, 237, *ante*, pp. 507, 598.

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THE LAW OF RAILWAYS.

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.*

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 work upon the subject of common carriers.

The distinction between common or public carriers and such as are merely private carriers 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

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

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

one who undertakes for hire or reward to transport from place to place the goods of such as choose to employ him. It need not be the 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, 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 bailment, both in this country and in England.[7]

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

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

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 their own 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 period 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]

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. R. 318, that a contract for rafting and running staves does not constitute the party 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 Harr. 238. See Dwight *v.* Brewster, 1 Pick. 50. The owner of a vessel usually employed in transporting goods from one port of the U. S. to another is a common carrier. Clark *v.* Richards, 1 Conn. R. 54.

*CHAPTER XXIII.

COMMON CARRIERS.

SECTION I.

Duty at Common Law.

1. *Definitions 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 carrier.*
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.*

§ 151. 1. Carriers of goods for hire indifferently for all persons at common law were denominated common carriers, and for a very long time have 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. 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 relief 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.[1]

[1] Forward *v.* Pittard, 1 Term. 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,

* 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.[2] In one case,[3] where the subject 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.[4] 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

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. R. 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. But see Hill *v.* Sturgeon, 28 Mo. R. 323. In a somewhat recent case, Read *v.* Spalding, 5 Bosw. 395; s. c. 30 N. Y. R. 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 seen, 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. R. 564. See also Merritt *v.* Earle, 29 N. Y. R. 115.

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

[3] Black Stock *v.* New York & Erie Railw., 1 Bosw. 77. But see also Cox *v.* Peterson, 30 Alab. R. 608; Hibler *v.* McCartney, 31 Alab. R. 501.

[4] Mershon *v.* Hobensack, 2 Zab. 372, 379; Forward *v.* Pittard, 1 Term 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., 9 Am. Railw. Times, Aug. 13, 1857, it is held, that in losses by fire the carrier is *primâ facie* liable. (Sup. Ct. Ohio.) See also Porter *v.* Chicago, &c. Railw., 20 Ill. R. 407.

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.[5] But 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.[6]

4. Or the loss of a vessel by running upon a snag in a river, brought there by a recent freshet.[7] But these cases have not been generally 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.[8]

* 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. 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

[5] Williams *v.* Grant, 1 Conn. R. 487.

[6] Pennewill *v.* Cullen, 5 Horr. 238.

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

[8] Bowman *v.* Teall, 23 Wend. 306; Parsons *v.* Hardy, 14 Id. 215; Harris *v.* Rand, 4 N. H. R. 259; Crosby *v.* Fitch, 12 Conn. R. 410. It has been held, that although a general bill of lading, given by a carrier, containing a general undertaking to carry, is subject 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 to that 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.

Loss by pirates is regarded as a loss by the public enemy. Magellan Pirates, 25 Eng. L. & Eq. 595. 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. R. 579. The master of a steamboat is not liable, for not drying wheat wet by inevitable accident. Steamboat Lynx *v.* King, 12 Mo. R. 272.

by having a lame horse he is longer upon his route, and is thus overtaken by a desolating flood upon the canal.[9]

6. But where a delay in the transportation is caused by the act of God, a railway is liable for injury to the goods, by bad handling, in endeavors to expedite the passage. But they are not liable, of course, for a decline in the price of goods during a delay which was inevitable.[10] 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.[11]

7. The rule of damages, as laid down by the Court of Exchequer in a late case [12] is, that where the carrier fails to deliver in time it is the duty of the owner to sell instantly at the market

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

[10] Lipford *v.* Railw. Co., 7 Rich. 409. Galena & Chicago Railw. *v.* Rae, 18 Ill. R. 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*, §§ 173, 175.

[11] Nettles *v.* Railw. Co., 7 Rich. 190; Black *v.* Baxendale, 1 Exch. 410; *post*, §§ 173, 175.

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. (S. C.) 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 factor's commissions upon the value should not be allowed the defendant in abatement. Id.

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. R. 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, *primâ facie* proof of negligence.

[12] Simmons *v.* Southeastern Railw. Co., 7 Jur. N. S. 849.

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 measure 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.[13]

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,[14] but that under proper averments and notice and proper proof special damages even beyond this might be recovered.[14] 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.[15] A special contract lessening general responsibility will not excuse negligence.[15]

[13] Wilson *v.* Lan. & Yorksh. R. Co., 7 Jur. N. S. 862.

[14] Priestley *v.* Northern Ind. & Chicago Railw. Co., 26 Ill. R. 205. *Post*, §§ 173, 175.

[15] Goldey *v.* Penn. Railw., 30 Penn. St. 242.

SECTION II.

Railway Companies Common Carriers.

1. *Common carriers, those who carry for all who apply.*
2. *Under the English statute entitled to notice of claim.*
3. *Railways liable as common carriers of passenger's baggage, and of freight.*

§ 152. 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 it is now regarded as an elementary * principle in the law that all who carry goods, for all who apply, are common carriers.[1]

[1] Parker *v.* Great Western Railw., 7 Man. & G. R. 253; Muschamp *v.* Lancaster Railw., 8 M. & W. 421; Palmer *v.* Grand Junction Railw. Co., 4 M. & W. 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. R. 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. The same rule of construction in regard to the liabilities of railways was adopted in Welling *v.* The Western Vermont Railw., 27 Vt. R. 399, and in Noyes *v.* The Rutland & Burlington Railw., 27 Vt. R. 110. The citation of cases under this head might be multiplied almost indefinitely. In Jones *v.* Western Vermont Railw., 27 Vt. R. 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. Two of the three last were cases 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 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.

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 anything done under the act within the meaning of the statute requiring notice.[2] But it is held that where 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.[3]

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 are to be increased in proportion to the hazard of the business.[4]

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. Russell *v.* Livingston, 19 Barb. 346 ; s. c. 16 Court of Ap. 515.

[2] 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.

[3] Kent *v.* The Great Western Railw. Co., 4 Railw. C. 699. This action is similar to Parker *v.* Great Western Railw. Co., 3 Railw. C. 563. In these cases, it was held, the taking of tolls is an act done in the execution of their charter powers.

[4] Commonwealth *v.* Power, 7 Met. 601 ; Jencks *v.* Coleman, 2 Sumner, 221 ; Camden & 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.

The duty of common carriers is independent of contract. Pozzi *v.* Shipton, 8

SECTION III.

Liability for Parcels carried by Express.

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 and n. *Extended discussion of the principles and grounds of decision of the cases as to the duty of express carriers.*

§ 153. 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]: —

Ad. & Ellis, 963; 1 P. & D. 4; 1 W. W. & H. 624; Bretherton *v.* Wood, 3 Bro. & B. 54. In both these cases, it is held the action may be in tort as well as in contract, there being no necessity of any special undertaking, a general duty to carry safely resulting from the very office of a common carrier. Therefore, a verdict may pass against some defendants and not against all, where the declaration is, in form, *ex delicto*.

[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. 370; Butler *v.* Basing, 2 C. & P. 613. But see the opinion of the court, in 23 Vt. R. 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

* "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, 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 mat-

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 *primâ 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. R. 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. R. 263. But the rule in the text is maintained, in Mayall *v.* Boston & Maine Railw., 19 New H. R. 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

ter 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. *Primâ 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. Butler *v.* Basing, 2 C. & P. 613.

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. Justice *Nelson*.[2] 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, ex-

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. R. 345.

[2] New Jersey Steam Nav. Co. *v.* The Merchants' Bank, 6 Howard, 344.

press 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.[3] This is indeed but a general principle of the law of contracts, familiar to every lawyer.[4]

And where a box containing goods, some of which were 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.[5]

But it was considered that the mere breaking of the box and abstraction of the contents was 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.[5]

6. In England and upon the continent, it is the practice for

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

[4] Lapham *v.* Green, 9 Vt. R. 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 Sand. 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. 388. Fisher *v.* Geddes, 15 La. Ann. 14.

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

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,[6] 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, on the ground of any special arrangement between themselves and those from whom they accepted the goods.[7]

8. Such companies following the business of carrying parcels between New York and Brooklyn, and such as carry the baggage of passengers from one depot to another in the city of New York, are common carriers, and liable as such.[8]

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.[9] And railways are regarded as common carriers, although not so named in their charter.[10]

10. We have prepared an elaborate article upon this general subject, so far as express companies are concerned, and embracing also their general duties, which appeared in the Law Register of the last year, and which we deem of sufficient convenience to the profession to be here inserted.[11]

[6] Mercantile Mutual Insurance Co. *v.* Chase, 1 E. D. Smith, 115; Sherman *v.* Welles, 28 Barb. 403.

[7] Longworthy *v.* New York & H. Railw., 2 E. D. Smith, 195.

[8] Richards *v.* Wescott, 2 Bosw. 289.

[9] Parmelee *v.* McNulty, 19 Ill. R. 556.

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

[11] 5 Am. Law Reg. N. S. 1.

THE RESPONSIBILITIES AND DUTIES OF EXPRESS CARRIERS.

1. *This article contains an epitome of the law in regard to express carriers.*
2. *Carriers by express responsible as common carriers.*
3. *And, in addition, the owners of goods have the responsibility of the carriers employed by such express company.*
4. *The same rule established by an early American case. Statement of facts.*
5. *Statement of the points decided. Responsibility of general carriers.*
6. *Contracts exonerating carrier for neglect against sound policy. Course of decisions, in America, upon analogous questions.*
7. *Finally settled, that carriers may contract for exemption from that extraordinary responsibility imposed by common law.*
8. *It was next attempted to allow them to contract for exemption from all responsibility. English statute. American rule much the same.*
9. *It is upon this ground that carriers are held*

responsible for parcels carried by their servants, in the due course of their business.

10. *The distinctive character of express carriers is, that they make personal delivery to the consignees upon their route.*
11. *Stipulations in the bills of lading executed by express companies, how far binding upon the owners of goods.*
12. *There should be the clearest evidence of free assent, or the conditions excusing the carrier from responsibility should not be held binding.*
13. *How far the consignor, or his agent, may stipulate for the transportation.*
14. *By the construction of the English statute against carriers making discrimination among their customers, it is held they cannot receive parcels of express companies and close their offices against others.*
15. *Illustration, from an English case, as to what degree of evidence will charge the owner of goods with knowledge of conditions inserted in the bill of lading.*
16. *The English rule as to responsibility of different carriers constituting a continuous line. The first carrier alone responsible to the owner.*
17. *The American rule allows the owner to sue any of the companies in fault.*
18. *Where there is no contract and no business connection extending to the entire route, the first carrier is only responsible for his own line.*
19. *Express carriers held responsible for safe transportation over their own line, and safe delivery to next carrier.*
20. *Analysis of more recent decisions, and new questions affecting express carriers.*
    (1). *Dangerous character of goods must be communicated to carrier.*
    (2). *Held, in New Jersey, that carrier cannot stipulate for exemption from responsibility, for his own negligence.*
    (3). *The first carrier, as to the transportation beyond his own route, is responsible only as a forwarder, for ordinary care and diligence. Lien.*
    (4). *General duty of carriers. English statute. Duty as to delivery.*
    (5). *Express companies should deliver at place of business of consignee, within business hours, and as soon as possible after arrival.*
    (6). *If they undertake, for hire, the collection of bills and notes, they are all responsible for all defaults in the course pursued, caused by their own neglect or mistake.*
    (7). *Railways, in drawing cars over their road, responsible as carriers.*
    (8). *The form of action and the extent of the recovery.*
    (9). *The damages recoverable of the carrier for loss or injury of the goods is limited to that affecting the goods; expected profits not included.*
    (10). *The carrier is entitled to a receipt for goods, as delivered in good condition, and the owner, to time and opportunity to examine.*

1. In attempting to give an outline of the responsibilities and duties of what are known familiarly, in this country, as express carriers, but more commonly called, in England, carriers of packed parcels, we shall be able to do little more than to epitomize what we have said in other parts of the work, with the additional convenience of bringing all the cases bearing upon the subject into one continued section.

2. There was, for a time, some question made in the courts how far these express carriers were to be subjected to the responsibilities of common carriers of goods and merchandise. But it seems to be now conceded, on all hands, that the express carrier is clearly responsible to those interested in any goods committed to his care for transportation, to the full extent of the responsibility of common carriers of goods. This has been so often declared by different courts of the highest authority, that there seems now no ground to question its entire soundness; and it will scarcely be useful to repeat here the numerous decisions upon the point. The following will show sufficiently the general current of the cases in this country, in all which it is held that express companies are responsible as common carriers: The Mercantile Mutual Insurance Co. *v.* Chase, 1 E.

D. Smith, 115; Sherman *v.* Wells, 28 Barb. 403; Baldwin *v.* The American Express Co., 23 Ill. R. 197; s. c. in error, 26 Ill. R. 504; Lowell Wire-Fence Co. *v.* Sargent, 8 Allen, 189.

3. In England, and upon the continent of Europe, so far as we know, the railway companies act to a considerable extent 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 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. Redfield on Railw., § 153, pl. 6; Baxendale *v.* Western Railw. Co., 5 C. B. N. S. 336; Garton *v.* Bristol & Exeter Railw. Co., 7 Jur. N. S. 1234; Branly *v.* Southeastern Railw. Co., 9 Jur. N. S. 329.

4. 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.

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

6. How far an express stipulation, on the part of the owner of goods committed to carriers for transportation, that the carrier shall be exonerated from all responsibility, even for the gross neglect of himself and his servants, can be regarded as a binding contract, and consistent with sound policy, is a question of too great extension and importance to be discussed here, as incidental to our main purpose. It is safe to assume, as the courts universally do, that no such result will be allowed to come about by anything less than the use of the most unequivocal language to that effect. All intendments and constructive inferences will be carried in the opposite direction. And when it becomes impossible to understand the contract between the carrier and the owner of the goods, in any other sense except that of exonerating the former for gross neglect, or even ordinary neglect, we trust the courts will maintain sufficient self-respect to declare the contract void. Redfield on Railways, § 161. It seems to involve a very curious anomaly, in the history of the progress of jurisprudence, that when a point, strenuously contested for years, is once finally conceded, it will generally give rise to serious efforts to carry the matter quite into the extreme of the *reductio ad absurdum*, in the opposite direction. This is very well illustrated, upon the point we are now considering, by briefly adverting to the course of the decisions upon the question, whether it was competent for common carriers, by express contract or general notice, to exonerate themselves from that extraordinary responsibility imposed upon them by the common law, whereby they are made insurers for the safe delivery of all goods committed to their custody. It was for a long period seriously and strenuously urged, by the courts, and by some text-writers perhaps, that such relaxation was wholly inadmissible. That was so held in Gould *v.* Hill, 2 Hill, 623; Hollister *v.* Nowlen, 19 Wend. 234; Cole *v.* Goodwin, Id. 251; and these cases are quoted, with approbation, by Mr. Justice *Nelson*, in N. J. Steam Nav. Co. *v.* Merchants' Bank, *supra*.

7. But it was finally found, upon more careful scrutiny, that there was no objection, in principle, to allowing the parties to contract, if done freely and upon reasonable conditions of equality, for any degree of relaxation of the extraordinary degree of vigilance and responsibility imposed upon carriers by the common law, provided the relaxation were not carried into the domain of negligence and inattention to duty. See Farmers' and Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. R. 186, 205, 206, where we have discussed the point more in detail.

8. After this point was universally yielded, if we except the state of New York, and some few others following their lead, it was next attempted to carry the right of exemption from responsibility, on the part of common carriers, by means of special contracts, still further, and virtually to allow them to make their own terms, both as to price and the degree of responsibility assumed in regard to the risk of transportation. The English statute, entitled The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 7, was passed in consequence, and has placed the subject upon more reasonable and practicable grounds in that country. This act allows the carrier to make any condition in regard to the terms of transportation, such as giving notice of the contents of packages, and paying insurance in advance; in short, upon any point, and to any extent, which the court before whom any action may be brought shall adjudge to be just and reasonable, provided that such conditions shall not be binding unless incorporated into a special contract signed by the person owning or delivering the goods. The English statute also provides, that no stipulation exonerating the carrier from responsibility for losses or injuries, caused by the neglect or want of ordinary care of the carrier or his servants, shall be binding upon the owner of the goods. As to the reasonableness of the conditions to be imposed by carriers, the American courts had anticipated the English statute. Farmers' and Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. R. 186.

9. The rule established by the case of N. J. Steam Navigation Co. *v.* Merchants' Bank, *supra*, in regard to the responsibility of the company to the owner for the safe transportation and delivery of parcels intrusted to expressmen employing such company, is not very different from that which had before existed in regard to parcels carried upon stages and steamboats by the drivers and captains, in some instances without the actual knowledge and consent, perhaps, of the owners of such agencies of transportation; and in other cases, when such agents or servants were allowed to carry such parcels, without accounting for the compensation, that being treated as a mere perquisite of office. In all such cases the owners of the conveyances always have been held responsible, as common carriers, for the transportation of such parcels. Farmers' and Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. R. 186, 203, 204, and cases cited. Before the establishment of express companies this was the usual and only public mode of transporting small parcels. Mayall *v.* Boston & Maine Railroad Company, 19 N. H. R. 122.

10. In turning our attention more specifically to the responsibility of express carriers, the first consideration distinctive of this mode of transportation is, that they are bound to deliver parcels to the persons to whom they are addressed.

This was the general rule as to carriers by land, until since the introduction of railways. Hyde *v.* Trent & Mersey Nav. Company, 5 T. R. 389; Stephenson *v.* Hart, 4 Bing. 476; Farmers' and Mechanics' Bank *v.* Champlain Transp. Co., 23 Vt. R. 186. Since the introduction of railways, carriers in that mode have been exempted from personal delivery of their parcels, and allowed to deposit them in warehouse, and thus exonerate themselves from the longer continuance of the responsibility of carriers. Thomas *v.* The Boston & Prov. Railroad Company, 10 Met. 472. But the great necessity for having express carriers arose from this defect in delivery of goods by the ordinary railway transportation; and the same defect also existed in regard to the delivery of goods transported by steamboats. They could only deliver at the wharves, and were not expected to employ special messengers and porters to deliver their goods. Chickering *v.* Fowler, 4 Pick. 371. And it is to remedy this inconvenience, and restore the carrying business by land to its former state, in some degree, that express companies have come in use, with the distinctive character of making personal delivery of their parcels to the consignees. Redfield on Railways, § 154. This has been so often decided that it is scarcely required that any considerable number of cases should be cited. This question is considerably examined, and the views just stated fully confirmed, in the case of Baldwin *v.* The American Express Co., 23 Ill. R. 197; s. c. affirmed, 26 Id. 504.

11. Perhaps the most important practical question, in regard to the responsibility of express carriers, arises upon stipulations made with them, or claimed to be made with them, in regard to the extent of their responsibility for the transportation. It has become very common with such companies to insert in the bills of lading or receipts which they deliver to those who leave parcels with them for transportation, such conditions as exonerate them from all extraordinary responsibility. We have no occasion to discuss the propriety or good policy of such practices. It seems to be regarded as competent, and binding upon the owners of the goods, if understandingly assented to by them. And this will generally be presumed where it is not, in some way, written or printed in such manner, purposely, as not to attract observation. If that appear to have been the design of the carrier, it is surely proper that he should derive no benefit from the condition. Any such evasion or subterfuge, which is obviously intended to mislead the owner of the goods, by leaving the impression that he has secured the unqualified responsibility of the carrier, while, at the same time, the carrier has secured a formal, but covert stipulation on his part, for exemption from that responsibility, should certainly be discountenanced.

12. And it has always seemed to us the courts will find it convenient, if not indispensable, to restrain these express companies, to some extent, in regard to limitations which they impose upon their customers. It should certainly appear that no deception is practised, but that the owner of the goods fully understood the conditions upon which the carrier claimed to deliver the goods, or else that he might have done so but for his want of ordinary care; and especially will this be requisite to be watchfully enforced, whenever the conditions found in the receipt are of an unusual and extraordinary character, and such as it is presumable that the owner of the goods would not readily have submitted to, without

the stress of some extraordinary pressure. In short, unless it appear that the conditions exonerating the responsibility of the carrier are reasonable, and such as it may fairly be supposed the owner of the goods would readily have assented to, nothing but the clearest, most satisfactory evidence that he did assent to them, should be received. And in all cases, any condition exonerating the carrier from his ordinary common-law responsibility should be clearly and plainly expressed in the contract, and in a form readily to attract the attention of the consignor of the goods.

13. And it may well be made a question, how far the consignor of goods by express, and especially the porter, or hackman, or city express, delivering parcels to the express carrier, have authority to bind the owner of the goods. The English statute makes the special contract of the owner or person delivering the goods sufficient in all cases. And any other rule would be liable to great inconvenience in practice, since the express carrier may make his own conditions for accepting goods, at the peril of an action, if the condition is not acceded to, and proves to be unreasonable, upon the trial of the action for not carrying. In other words, express carriers, in common with all other carriers, are bound to accept and carry all goods offered, within the range of the business they hold themselves out to do, if the charges are also tendered; and they cannot exonerate themselves from this obligation at common law by insisting upon annexing any condition relieving their ordinary responsibility. Garton *v.* Bristol and Exeter Railw. Company, 1 El. B. & S. 112; s. c. 7 Jur. N. S. 1234. But if they do annex any such condition, at common law, or what is called under the English statute an unreasonable condition, and the same is not acceded to, they remain liable to such damages as the party has sustained, by reason of their refusal to carry the goods, or what is the same thing, to carry them except upon conditions which they had no right to claim. But if, instead of refusing to accede to the conditions claimed by the carrier, and pursuing his remedy by action, the owner of the goods finds it more convenient to yield to the demands of the carrier, which he might have resisted, and stipulates with the carrier, fully and understandingly, for a reduced degree of responsibility, as a choice of evils, we see no good reason why he should not be bound by his contract, although to some extent compelled to adopt it, as the lesser of two evils, both of which he could not escape. And in general it is fair to conclude that the consignor of the goods, or any agent to whom he sees fit to intrust the delivery of the goods, will and must have authority to bind the owner, in his absence; since some one must act on his behalf in giving instructions, and making conditions affecting the transportation; and in the absence of the owner, and of any known general agent of such owner, it seems almost a necessity to give the person delivering the goods, or having charge of the delivery, not the mere porter or servant, but the agent under which such servant acts, power to bind the owner. The recent English case of Bartlett *v.* London and Northwestern Railw. Co., 7 H. & N. 400, s. c. 8 Jur. N. S. 58, seems to assume the same general view. It was there held that the consignors had the right, in the first instance, to make a binding contract with the carrier, as to the mode of delivery; but that the carrier would be excused if he modified the performance of the same, according

to the directions of the consignee, thus giving the consignor, whether owner or not, the right to make a binding contract on the part of every one interested in the transportation in the first instance, as to every matter pertaining to it, but at the same time, from like considerations of convenience and necessity, allowing the consignee to modify such contract as to those matters apparently affecting his agency, whether he were in fact the owner or not.

14. It was decided in the case of Garton *v.* Bristol and Exeter Railw. Company, *supra*, that a railway company had no right to close their office and refuse to receive parcels packed in the same way express agents were accustomed to pack them, while they were still receiving such parcels from such agents.

15. In a late English case, Lewis *v.* Great Western Railw. Company, 5 H. & N. 867, upon the point of the agent making the delivery of goods, being bound by the conditions inserted in the memorandum made and signed at the time, when 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 of 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 that the contract was subject to the conditions; and they were considered just and reasonable within the English statute.

16. It becomes a very important practical question, To what extent the first express carrier, upon a long line of transportation, is responsible. We see no reason why the responsibility of this class of carriers should not be the same, as to long lines of transportation, as that of other carriers. The profession all agree that there is a distinction in this respect between the rule of responsibility imposed upon carriers in America, on long lines of transportation, and that imposed in England. In the latter country, by a long and uniform course of decision, based upon the leading case of Muschamp *v.* Lancaster and Preston Railw. Company, 8 M. & W. 421, it is clearly established that the carrier, by accepting a package of goods, marked for any distant point, assumes the responsibility of its safe arrival and timely delivery at its ultimate destination. The rule has been carried so far in England that it has been recently held in the House of Lords, Bristol and Exeter Railw. Company *v.* Collins, 7 House of Lords Cas. 194, s. c. 5 Jur. N. S. 1367, that the contract in such cases is so exclusively with the first company, that the owner of the goods can maintain no action against any of the subsequent companies upon the line, even by showing that the loss or injury occurred through their default. And the same rule is there applied to the baggage of passengers ticketed over an extended line of travel, consisting of different companies; the first company is alone responsible to the owner, there being no priority between him and the others. Mytton *v.* Midland Railw. Co., 4 H. & N. 615.

17. But the rule of responsibility in all these cases is very different in the

American courts. We do not consider that there is any such want of privity as to the subsequent companies, that the owner of the goods or baggage may not maintain an action against any of the subsequent carriers upon the line, by showing that the loss occurred there. It has been decided that the first company, where there is a business connection through the route, is liable for the whole route. Cary *v.* Cleveland and Toledo Railw. Company, 29 Barb. 35. And it has also been held, where the different companies constitute a continuous line, and run their cars over the whole route without change, selling through tickets and checking baggage through, that an action for loss of baggage, anywhere upon the route, will lie against either company. Hart *v.* Rensselaer and Sar. Railw. Company, 4 Selden, 37.

18. We have already intimated that, in this country, the first company upon a continuous line of transportation, where there is no business connection between the different companies constituting the route, assumes no responsibility beyond its own line, except for safe delivery to the next carrier upon the route. Redfield on Railways, § 162, pl. 2, and numerous cases cited in note 6. The first carrier may, by special contract with the owner, assume the entire responsibility of the safe delivery at the ultimate destination. Id. n. 7, and cases cited. And where there is a business connection between the different companies, extending through the entire route, the first company will be regarded as having assumed the responsibility of the entire route, unless there is something in the contract or the circumstances indicating a different purpose. Redfield on Railways, § 162, and cases cited, pl. 4, n. 8, 9.

19. The same rules of construction and of responsibility, so far as we know, have in this country been applied to express companies. They have generally been held responsible for safe transportation to the end of their lines, and careful delivery to the next company on the route, with proper directions to each successive carrier; and it was also considered that the successive carriers were only responsible for transportation across their own line, and for safe delivery to the next carrier, according to the usual and most direct line of communication with the ultimate point of destination. Thus where an express company at Detroit received a package addressed to New York city, which came into the hands of the defendants at Suspension Bridge, who carried it to Albany, and there delivered it to the Hudson River Railway, common carriers between that city and New York, giving proper instructions to that company, it was held that the defendants were thereby exonerated from further responsibility. Hempstead *v.* New York Central Railw. Company, 28 Barb. 485. Where special instructions, in regard to the mode of delivery, are given by the consignor, they must be followed, unless, as we have seen, they are modified by the consignee, and in either case the carrier must follow the latest instructions. Michigan S. & N. Indiana Railw. Company *v.* Day, 20 Illinois R. 375. In the English courts it makes no difference as to inferring a contract with the first carrier for the entire route, that it consist partly of steamboat transportation and partly by land where there is no railway; in all cases a presumptive responsibility for the entire route attaches to the first carrier. Wilby *v.* The West Cornwall Railw. Company, 2 H. & N. 702.

20. We might extend this article to an almost indefinite length, but we must now content ourselves with a brief allusion to some few questions of special interest connected with this mode of transportation, and an imperfect analysis of the more recent decisions bearing upon these questions.

(1). One who employs a carrier to carry an article of such a dangerous character as to require extraordinary care in its conveyance, must communicate the fact to the carrier, or he cannot hold him responsible for any injury to such article, which is, to any extent or in any manner, the result of his omission to make such communication, either to the carrier or his servants. Farrant *v.* Barnes, 11 C. B. N. S. 553; s. c. 8 Jur. N. S. 868.

(2). In the somewhat recent case of Ashmore *v.* The Pennsylvania, &c. Trans. Co., 4 Dutcher, 180, the Supreme Court of New Jersey decided that, although it was entirely competent for a carrier to stipulate for exemption from his extreme common-law responsibility, he could not by such contract discharge himself from responsibility for the consequences of his own fault or negligence, or that of his servants. And it seems always to have been held in Ohio, that common carriers cannot relieve themselves of their first and legal responsibility by their own acts, or by general notice brought home to the knowledge of the owner of the goods, and not objected to by him. Davidson *v.* Graham, 2 Ohio State, 131; Graham & Co. *v.* Davis & Co., 4 Id. 362. See also *Scott*, J., in Welsh *v.* The Pittsburgh, Fort Wayne, & Chicago Railroad Company, 10 Ohio St. 65, citing Jones *v.* Voorhes, 10 Ohio R. 145. And it was held, in a recent case in Massachusetts, Judson *v.* The Western Railroad Co., 6 Allen, 486, 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.

(3). As before intimated, the first carrier upon an extended route of transportation, to whom goods are delivered, addressed to some remote point upon the route, acts as a mere forwarding agent, as to those connected with the transportation beyond the terminus of his own route, and, as such, is only bound to the extent of ordinary care and common diligence. Northern Railroad Co. *v.* Fitchburg Railroad Co., 6 Allen, 254. And 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 the 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. Briggs *v.* Boston & Lowell Railroad Co., 6 Allen, 246. But common carriers can acquire no lien upon goods transported for the national government, so as to justify their detention. Dufolt *v.* Gorman, 1 Min. R. 301.

(4). The general duty of carriers of goods is defined in a late English case, Hales *v.* London & Northwestern Railw. Co., 4 B. & S. 66, to be, to carry according to the usual route professed by them to the public, and to deliver within a reasonable time. And in another late English case, Peck *v.* North Staffordshire Railw. Co., 9 Jur. N. S. 914, it is held, that all the parts of the statute

regulating the traffic, must be taken together, and the conditions affecting the responsibility of carriers must be, in the opinion of the court, both just and reasonable, and be also embodied in a special contract in writing, signed by the owner or sender of the goods. S. P. Aldridge *v.* Great Western Railw. Co., 15 C. B. N. S. 582. And some of the American courts seem to insist that safe delivery to the consignee is *primâ facie* the duty of all carriers; and with the necessary exceptions, that it be upon their professed route, and consistent with their mode of doing their business, we see no ground to question the binding obligations of that rule. Bartlett *v.* Steamboat Philadelphia, 32 Missouri R. 256.

(5). And in regard to express companies, who are generally supposed to undertake for personal delivery to the consignee of all packages within the range of their own particular route, it has been lately decided, that such company should deliver at the place of business of the consignee, as early as practicable after arrival, and within the usual business hours. Marshall *v.* The American Express Co., 7 Wis. R. 1.

(6). Express companies have, to a considerable extent, acted as collectors of bills of exchange and notes in some portions of the country. And it becomes a very serious question for them as well as the public how far such business is likely to involve them in responsibility, it being something quite beyond and aside of the ordinary carrying business. In a late case in Indiana, it was held, that where such company receives for collection, for compensation, a bill of exchange, drawn in one state and payable in another, and delivers the same to a notary for demand and protest on the day before it should regularly be made, and in consequence the notary makes such demand one day before the maturity of the bill, whereby the drawer and indorsers are released, the acceptor being insolvent, the company will be liable to the holder for the sum due upon the bill. American Express Co. *v.* Haire, 21 Ind. R. 4.

(7). It seems that it will not relieve a railway company from its responsibility as a common carrier, because the owner of the goods furnishes his own car, in which property is transported, and assumes the loading and unloading, and furnishes a brakesman to accompany the car. Mallory *v.* Tioga Railroad Co., 39 Barb. 488.

(8). As to the form of action against common carriers, it seems to have been settled, from an early day, that a delivery to a wrong person will amount to a conversion. Duff *v.* Budd, 3 B. & Bing. 177; Sanquer *v.* London and Southwestern Railroad Co., 32 Eng. L. & Eq. 338; Claflin *v.* Boston and Lowell Railroad Co., 7 Allen, 341. And the carrier may maintain an action in his own name for injury done to property intrusted to him, and may even recover the value of the property, which he will hold in trust for the owner. Merrick *v.* Brainard, 38 Barb. 574. But in an action for non-delivery of the goods, the owner cannot recover for an injury to the goods. Nudd *v.* Wells & Co., 11 Wis. R. 407.

(9). The courts have had considerable controversy in regard to questions affecting the amount of damages recoverable of common carriers. The English courts adhere strenuously to their former views, that all speculative damages are to be excluded. Redfield on Railways, § 175. Thus, where the plain-

tiff had ordered goods, by express, for the purpose of manufacturing them into articles for sale, from which he expected to derive considerable profit, and the articles were not delivered until the season for the business had passed, the plaintiff was held to recover the difference in the market value of the articles between the time of expected and actual delivery, but nothing for the loss of profits. Wilson *v.* Lancashire and Yorkshire Railw. Co., 9 C. B. N. S. 632, s. c. 7 Jur. N. S. 862. The same rule is declared in Simmons *v.* Southeastern Railw. Co., 7 Jur. N. S. 849. And where the goods are not delivered at all, the rule of damages is the value at the time and place of delivery, and interest from that time. Spring *v.* Haskell, 4 Allen, 112. A common carrier may limit the extent of his responsibility by express contract, but it is said, in New York, not by mere notice. Nevins *v.* Bay State, &c. Co., 4 Bosw. 225.

(10). It has been decided that the carrier may require of the consignee a receipt, showing the delivery of the goods in good condition, and that the owner has a corresponding right to examine the goods before giving the receipt, to determine their condition. Skinner *v.* Chicago and Rock Island Railroad Co., 12 Iowa R. 191. This seems to be the only just rule in regard to the subject. But we apprehend the practice has been different, to some extent: express companies requiring the name of the consignee upon their delivery books, which amounts to a receipt for delivery, which presumptively means in good condition, but, at the same time, refusing time or opportunity for examination. We are sure this practice prevails to some extent, but we believe without any just foundation.

There are many other points we would be glad to examine, but we have no space. Our readers will find a valuable case, upon this subject, in another place in this number.

In the case of Hooper *v.* Wells, Fargo & Co., 5 Am. Law Reg., N. S. 16, the following points are decided :

The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different.

The common carrier who undertakes to carry goods for hire is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause arising; the acts of God and the public enemy alone excepted.

Forwarders are not insurers, but they are responsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employees.

Restrictions upon the common-law liability of a common carrier, for his benefit, inserted in a receipt drawn up by himself and signed by him alone, for goods intrusted to him for transportation, are to be construed most strongly against the common carrier.

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 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 care-

lessness 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 conveyance. The managers and employees of the steamboat are, in legal contemplation, for the purposes of the transportation of such goods, the managers and employees of the carrier.

A receipt signed by a common carrier for goods intrusted to him for transportation for hire, which restricts his liability, will not be construed as exempting him from liability for loss occasioned by negligence in the agencies he employs, unless the intention to thus exonerate him is expressed in the instrument in plain and unequivocal terms.

Under our Practice Act a complaint cannot be amended in this court so as to make it correspond with the verdict. The District Court, in a proper case, before judgment, may direct the complaint to be so amended.

The foregoing case we regard as one of great interest. The amount involved, and the peculiar character of the case, would naturally have led to the most careful scrutiny, both of court and counsel; and we feel the utmost confidence in giving our full assent to each and all the propositions so carefully and so ably maintained by the learned judge.

1. The first question stated in the syllabus, which admits of any controversy, is that in regard to the restrictions contained in the carrier's receipt. The proposition that such restrictions are to be construed most strongly against the carrier, is only the common rule of construction in all analogous cases, that, in pleadings or contracts, the words, in a precise equipoise of intendment or import, shall be taken against the person using the words. We believe the decisions upon this point, stated in our leading article, *ante*, p. 20, would have justified the learned judge in stating the proposition somewhat more strongly against the carrier. We understand the courts, as requiring satisfactory evidence, that the owner, at the time he left the goods for transportation, either did understand the nature of the conditions upon which the carrier claimed to accept them, or else, that he would have so understood them, but for his own want of ordinary care. *Ante*, pp. 19, 20.

2. 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 defendant's 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.

3. 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;

4. Still, they were not obliged to do so. This company were employed 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 before shown, *ante*, pp. 22, 23, 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 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. *Ante*, pp. 23, 24. And we think this the more just and reasonable rule.

5. 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 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. R. 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.*

6. The same remark 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 justice. Redfield on Railways, § 160, 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, s. 7. See also Redfield on Railways, § 160, notes 9–17, and §§ 161, 167, and notes, where these questions are very extensively considered. In conclusion, we must repeat, that we have been gratified with the careful and unexceptionable manner in which the principal case is studied and reasoned out, in all its bearings; and although we have felt compelled to declare our opinion, that the propositions stated in the opinion of the court fall short of the ultimate truth upon those points, they clearly cover the case, and that is all the court could decide. We do not like to make invidious comparisons between the opinions of courts in different sections, but we must say, if lawyers look at the decisions beyond their own state, they should not overlook California.

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 beyond their routes.*
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. Primâ facie *only responsible to end of his own route.*
8. *English statute requires packed parcels to be carried by weight.*

§ 154. 1. This is a mode of transportation 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 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 recent 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

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 upon the route, and his giving it in charge of the

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, is a delivery according to the address of the parcel, at the bank, to the proper officer.

But where the express delivers 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, unless such delivery was authorized by the bank; and it is incumbent upon the express 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 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 was 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.

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, 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 for some exemption from their ordinary common-law liability as carriers, in the transportation of the business of the express, and this is made known to 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 it must result from some agency beyond the control of the agents and employees of the carrier. And therefore a railway company is liable for loss caused by 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 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 torchlights 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 *primâ facie* responsible for the loss.[6]

In an important case which recently occurred,[7] where a pack-

[2] N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344.
[3] Blackstock *v.* N. Y. & Erie Railw., 20 N. Y. R. 48.
[4] Cox *v.* Peterson, 30 Ala. R. 608.
[5] Hibler *v.* McCartney, 31 Ala. R. 502.
[6] Fenn *v.* Timpson, 4 E. D. Smith, 276; Hall *v.* Cheney, 36 N. H. R. 26.
[7] Baldwin *v.* The American Express Co., 23 Ill. R. 197.

age 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 they are *primâ facie* liable unless such delivery is made, unless where the business is too limited to justify keeping a messenger to perform such act of delivery, and in such cases prompt notice should be given to the consignee of the arrival of the package. 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, and 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 key of the company's safe securely, whereby it was obtained by one who stole the key and the money by thus gaining access 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,

[8] American Express Company *v.* Baldwin, 26 Ill. R. 304.

[9] Burton *v.* The Great N. Railway, 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 anything, 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.

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 railway 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]

4. Express carriers who take parcels marked for points beyond their route, and where they have no agents, are only bound, as common carriers, to carry safely to the end of their route, and deliver to the usual conveyance from such point to the place of destination.[11] They may 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 im-

[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 otherwise herein expressed, or unless specially insured and so specified in the receipt," where no insurance was made and 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 & 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.

pose 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 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 makes 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

[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. R. 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.

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

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]

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

[16] Baxendale *v.* Southwestern Railw., 12 Jur. N. S. 274. 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 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 N. Y. 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 transportation. 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 Co. 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.

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.*

§ 155. 1. It is an elementary principle in the law, that the carriers of passengers are liable as common carriers for their

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

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 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,

facilities upon one of the roads, not of a sudden development or of a temporary 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.

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

[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, or 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, 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.

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 companies to keep agents in readiness to receive baggage, and if they allow the agents of other companies to receive its 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]

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

But the liability having once attached, by a delivery to the company's servant, they remain liable until a full and unequivocal redelivery to the owner, and ordinarily to the end of the route.[9] A delivery upon a forged order is no excuse.[10]

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

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.

[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 carriers ceases, and they are holden only for ordinary care, as bailees for hire. *Post*, § 157; Van Horn *v.* Kermit, 4 E. D. Smith, 453.

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.[11]

But where an emigrant 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.[12]

[11] 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 C. C. 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 court, 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 Aug. Railw. *v.* Lythgoe, 10 C. B. 726; s. c. 2 Eng. L. & Eq. 331; Cawley *v.* Furnell, 12 C. B. 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 railroad 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 railroad 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 railroad companies.

[12] Cohen *v.* Frost, 2 Duer (N. Y.), 335. In Fisher *v.* Clisbee, 12 Ill. R. 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.* Devin, 13 Ill. R. 746. But see White *v.* Winnisimmet 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 St. 722, it was held, that a ferryman is

In a very recent English case[13] the question of the degree of exclusiveness of care which the passenger must take of his bag-

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. R. 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. R. 51, where the plaintiff, intending to take passage on defendant's 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 that 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. R. 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 *primâ 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.

[13] Le Contreur *v.* London & Southwestern Railw., 12 Jur. N. S. 266 (1866).

gage 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 defendant's, 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.[14]

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

[14] Marshall *v.* York, Newcastle, & Berwick Railw., 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. R. 26.

trunk and clothes for the journey.[15] And it is not important whether the passenger pay his own fare or it is paid by his friends.[16]

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,[17] they must be regarded as having accepted it, as common carriers, and their responsibility as such attaches. Thus in Connecticut[18] the plaintiff took his trunk to a railway station at 11 o'clock, A. M., and requested that it be checked for the next train to B., which was to leave at 3, P. M., but being informed that they did not give checks for baggage until within fifteen ninutes of the departure of the train, he left his trunk with the agent, and at the proper 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 it 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.[18]

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

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

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

[18] Hickox *v.* Naugatuck R. R. Co., 31 Conn. R. 281.

*SECTION VI.

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 till they receive the goods, on a continuous line.*
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.*

§ 156. 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 at the usual place of receiving similar articles, and notice given to the proper servant of the company, there is little chance for any question 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

[1] *Lee*, Ch. J., in Dale *v.* Hall, 1 Wilson, 281; Merriam *v.* Hartford and New Haven Railw., 20 Conn. R. 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. R. 400. See also Lakeman *v.* Grinnell, 5 Bosw. 625.

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 was 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 carriers 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, "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]

[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.

[3] Maybin *v.* The S. C. Railw., 8 Rich. 240. In the case of Ranney *v.* The Huntress, 4 Law J. 38, U. S. C. C. Maine District, 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 Kreuder *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."

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 carrier, 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]

[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, C. & Marsh. 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. R. 595. See also Ford *v.* Mitchell, 21 Ind. R. 54.

[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. § 165, *post*. 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.

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

[10] Selway *v.* Holloway, 1 Ld. Ray. 46; Packard *v.* Getman, 6 Cow. 757.

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 and 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 reliable for ordinary neglect. Platt *v.* Hibbard, 7 Cowen, 497. See Mich. Southern & Northern Ind. R. R. Co. *v.* Shurtz, 7 Mich. R. 515.

SECTION VII.

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 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 may 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 carrier has place of receiving goods, responsibility attaches on delivery there.*
14. *Warehouse-men, who are carriers, held responsible as carriers, on receipt of goods, generally.*
15. *Goods addressed by carrier to his own agent does not terminate transit.*
16. *Consignor 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. *Carrier cannot charge for carrying to and from depot, unless, &c.*
21. *By English statute can make no discrimination among customers.*

§ 157. 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 responsibility 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]

[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. R. 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.

[2] Duff *v.* Budd, 3 Brod. & B. 177. So, too, if the carriers deliver the goods

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]

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. R., 32 Eng. L. & Eq. 338; Claflin *v.* Boston & L. Railw. Co., 7 Allen, 341.

[3] Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. R. 186, 209; Noyes *v.* Rut. & Bur. Railw., 27 Vt. R. 110; 1 Parsons on Cont. 661. We here adopt Professor Parsons's note of the case (23 Vt. R. 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 plaintiff's bank to the captain of defendants' boat, 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

* 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 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

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 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

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.

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.[4] 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.[5]

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. R. 630; Hosea *v.* McCrory, 12 Id. 349.

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

[5] 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, 195. 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 Wisc. R. 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

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 depositary, for ordinary neglect.[6] 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.[7]

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.[8]

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

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 store-house 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 agreement 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.

[6] 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.

[7] Price *v.* Powell, 3 Comst. 322; 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.

[8] 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. R. 211.

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.[9]

This 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,[10] the rule of the liability of the carrier and the warehouse-man 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

[9] 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 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 warehouse-man 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 warehouse-man the goods are destroyed, the warehouse-man 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 warehouse-man, 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 R. 55.

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

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,[11] 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 having called for the goods about 3 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.[12]

8. There is then no very good reason, as it seems to us, why

[11] Wood *v.* Crocker, 18 Wis. R. 345. See also Ala. & Tenn. Co. *v.* Kidd, 75 Ala. R. 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 warehouse-man to whom he delivers the goods, and the carrier will be bound to warehouse according to its general and well-known custom, but cannot excuse itself by a usage of a few weeks not generally known or to the consignee.

[12] *Ante*, § 156, and cases cited. McCarty *v.* New York & Erie Railw., 30 Penn. St. 247.

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, 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 bailees for hire, as held in Norway Plains Co. *v.* Boston & Maine Railway, or as was held in Smith *v.* Nashua & Lowell Railway, 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 warehouse-man, 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.[13] This point is there very dis-

[13] 10 Met. 472. In this case the action was for one roll of leather, out of four lost in the defendant's 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

tinctly *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.[14] We

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.

[14] Michigan Central Railw. *v.* Ward, 2 Mich. R. 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. R. 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 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. R. 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,

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

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, either positively or permissively, to the wrong person, by mistake, the company are liable. And they are *primâ 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. R. 403.

In the case of Chicago & Rock Island Railw. *v.* Warren, 16 Ill. R. 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."

But in justice to 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.[15] We may be allowed

[15] "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; that no special notice was given to plaintiffs, or their agents, but that the fact was known to Ames, a truckman, who was their authorized agent employed to receive and remove the goods; that they were ready for delivery at least as early as Monday morning, the 4th of November, and that 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 waybill, 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 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 down, 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 warehouse-men, 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 common highways and streets, and which, therefore, can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea in this respect, that, from the very nature of the case, the merchandise can only be transported along one line and delivered at its termination, or at some fixed place by its side at some intermedi-

to say, * that it seems to us, the opinion and argument of the learned chief justice might, for the most part, be quite as well

ate point. The rule in regard to ships is very exactly stated in the opinion of *Buller*, J., in Hyde *v.* Trent & Mersey Navigation Co., 5 Term 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, 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 Term 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

applied to the * rule for which we contend, as to have reached the result which it did.

* 10. And where the consignee called for the goods, and the station agent told him they were not there, and in consequence they were not removed, but were destroyed by fire the same night, it was held the company were liable.[16]

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 procures the use of the machinery of the second company to unload the block, which is broken through defect of such machinery, it was held the first company are not liable for such injury, and that their responsibility terminated when the marble was taken from their station,

additional charge would retain it in their own warehouse until the consignor 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 warehouse-men." "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 warehouse-men 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 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."

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

* 258, 259

that being a virtual delivery to the consignee.[17] And the responsibility of the carrier 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,[18] 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 remove them.[19] 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.[20] 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.[21]

In the State of Michigan, 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

[17] 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. DeMott *v.* Laraway, 14 Wend. 225.

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

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

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

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

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 warehouse-men, 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 warehouse-men, at the furthest.[22]

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.[23] 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 & Mersey Navigation Company,[24] 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

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

[23] *Post*, § 162, and cases cited. In Converse *v.* Norwich & N. Y. W. Co., 33 Conn. R. (not yet reported), 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.

[24] 4 T. R. 583. And in every case where a warehouse-man or forwarding merchant ships goods, it is his duty to advise the consignee of it immediately. Bailey *v.* Porter, 32 Mo. R. 471.

liability,[25] in this mode a continuous liability of carriers is kept up throughout the line, which it seems to us is the 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.[26]

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.[27]

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.[28]

17. In one case,[29] 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, where a parcel being tendered to the consignee and

[25] *Ante*, § 156.

[26] 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.

[27] Russell *v.* Livingston, 16 N. Y. Ct. App. 515.

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

[29] The Great Western Railw. *v.* Crouch, 3 H. & N. 182; s. c. *post*, § 172, pl. 16 and note.

not being accepted was sent back to the consignor without reasonable delay, as the jury found, the parcel having remained in the office of the carrier to which it had been returned and not having been called for; but about two hours after it was first tendered the consignee called for it, and tendered all charges claimed, but was told it had been returned to the consignor: 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.[30] 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.[31]

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 consignors into warehouse. And this he may do in his own warehouse or those of others, according to the usual course of business at the point.[32]

[30] *Ante*, § 157.

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

[32] 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. R. 186, 211; Norway Plains Co. *v.* Boston & Maine Railw., 1 Gray, 263; Chicago & Rock Island Railw. *v.* Warren, 16 Illinois R. 502.

20. 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.[33]

21. 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,[33] or of carrying for particular ones who have large amounts of freight at prices below their usual rate.[33]

*SECTION VIII.

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.*

§ 158. 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]

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

[1] Benett *v.* Peninsular Steamboat Co., 6 Man. Gr. & Scott, 775; Story on Bail. § 591; Jencks *v.* Coleman, 2 Sumner, 221, 224.

[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

Where 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, to which by adding his own, an amount exceeding 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

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. R. 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. Nordmeyer *v.* Loescher, 1 Hilton, 499.

It is said in Skinner *v.* Chicago & Rock Island R. Co., 12 Iowa R. 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 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.

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

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

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

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 conveyance 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, if one who was bailee of goods to book them with the defendants, * stage proprietors and common carriers of parcels, to carry to London, but instead of doing so, put them in his own bag, which the defendants lost, it was held he could not

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

[8] 1 Parsons on Cont. 649 ; *ante*, § 155, n. 11.

[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.

[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*, § 168.

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, 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 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]

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

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

[15] Crouch *v.* The Great N. Railw., 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., 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., 34 Eng. L. & Eq. 573 [1856], 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 § 182, *post*, 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 W. Railw., 8 Eng. L. & Eq. 447.

An opinion is here intimated 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, 26 Eng. L. & Eq. 398, is cited in confirmation of the claim. But it was

*SECTION IX.

Notice 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.*

§ 159. 1. The effect of special or general notices, in restricting the general liability of carriers, is one of vast importance, and 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 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 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., 10 Eng. L. & Eq. 437; Alder *v.* Keighly, 15 M. & W. 117; *post*, § 181, n. 2.

In a recent and important case in the House of Lords, Finnie *v.* Glasgow & Southwestern Railw., 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 acute 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.

has *created a great deal of discussion. We should scarcely be expected to go into the full detail of the whole subject, but

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. But 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 between goods carried partly by water and partly by railway and those carried exclusively by railway, in their fares. Ransome *v.* Eastern Co. 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 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

we shall state the points established by the better-considered cases upon the subject. It was never made a serious question,

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. R. Co., 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 R. Co., 8 Jur. N. S. 1072; s. c. 3 Giff. 650; Same *v.* Great Western R. 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 R. Co., in Ex. 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 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., 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. R. 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., 36 C. B. (N. S.) 718.

in the English law, since the case of Southcote, 4 Co. 83, that any bailee might stipulate for an increased or a diminished de-

A railway company is not guilty of unjust discrimination by reason of charging more for several parcels, where they are directed to different persons, than if they were all addressed to the same person. Baxendale *v.* The Eastern Counties Railw., 4 C. B. (N. S.) 63. 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 & S. W. 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.* The 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 advantage 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

gree 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

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 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.) 707.

The doctrine of the case of Nicholson *v.* Great Western Railw., *supra*, is reaffirmed in 7 C. B. (N. S.) 755.

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' 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.

[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.

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.

[2] 11 George 4 & 1 Will. 4, ch. 68.

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]

[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.* Voorhies, 10 Ohio R. 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. In the Western Transportation Co. *v.* New Hall, 24 Ill. R. 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. R. 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 I. Railw., 5 Sandf. 180.

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 Champ. Transp. Co., 23 Vt. R. 186; Barney *v.* Prentiss, 4 Har. & Johns. 317.

As the result of all the cases upon the subject, and of true policy and sound

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

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. R. 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 J. Steam Nav. Co. *v.* The Merchants' Bank, 6 Howard (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. R. 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, 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

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

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

[5] Moses *v.* Boston & Maine Railw, 4 Foster, 71; *ante*, § 157, n. 13.

[6] Sager *v.* P. S. & P. Railw., 31 Maine R. 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. S. 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 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 § 167. 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. R. 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, be-

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

tween 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 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

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]

*SECTION X.

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.*

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

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

[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."

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 newspapers, 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]

[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 exist 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 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*, § 159, 160.

[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

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 handbills 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]

* 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 neg-

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. R. 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 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. R. 140, 141, 142, opinion of the court.

lect,[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 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

[10] *Post*, n. 9, 10, 11, 12, 13, 14, 15, 16, 17, § 161. See also Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. R. 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 R. 136. Where the plaintiff contracted to have cattle carried on defendants' train at a lower rate than the usual charge, and stipulate 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.

[11] 17 & 18 Vic. ch. 31, § 7.

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

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 Garnett *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.

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."

[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*, note 14, § 160.

[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.

[17] 4 Price, 31; Birkett *v.* Willan, 2 B. & Ald. 356, is decided upon the author-

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

ity 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*, § 167, 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* principles 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 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-

seems to us entirely consistent with the general views assumed by *Best*, J.

* 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

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. R. 26.

[21] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344. This was a case 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 express-man, 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

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

Lexington, one of the company's boats, at the time it was burned in the Sound, through the gross mismanagement of the company's agents, 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 Sand. 136; Parsons *v.* Monteath, 13 Barb. 353; Stoddard *v.* The Long Island Railw., 5 Sand. 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 R. 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 anything, 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 ex-

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

tra 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 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 St. 362. See also Baldwin *v.* Collins, 9 Rob. (Louis.), 478. Newstadt *v.* Adams, 5 Duer, 43.

[22] *Post*, § 162, and notes.

In Austin *v.* The Manchester, S. & L. Railw., 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 efficiency 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 axletree, which was attributable to the culpable negligence of the company's servants.

Cresswell, J., in delivering judgment, said: "In the largest sense those words

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

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 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 Lan. & Yorkshire Railw., 7 Eng. L. & Eq. 395, 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, 14 Eng. L. & Eq. 340 (1852), 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. This, 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, 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 con-

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

veyed 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 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 McManus *v.* Lancashire & Yorkshire Railw., 30 Law Times, 321, the same rule is maintained as in Chippendale *v.* Lon. & 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*, § 157.

It does not seem to be regarded as important 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, 25 Eng. L. & Eq. 396. In the case of Walker *v.* The York & North M. Railw. Co., 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

dicial * 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'

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 the direction was right. See also Morville *v.* Great Northern Railw., 10 Eng. L. & Eq. 366; Willoughby *v.* Horridge, 16 Eng. L. & Eq. 437; 12 C. B. 742; Crouch *v.* London & N. W. Railw., 21 Law J. 207.

And the case of Fowles *v.* the Great Western Railw. Co., 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, 25 Eng. L. & Eq. 396.

But the late case of Hearn *v.* The London & S. W. Railw., 29 Eng. L. & Eq. 494 (1855), 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 later cases had apparently regarded as nearly hopeless, under their most extraordinary notices. But we shall refer to this case more at length under § 167, 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 liability, 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*, § 159, n. 3; § 160, 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 St. 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. R. 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 express 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. R. 348.

exemption from liability, even for gross neglect and wilful misconduct, could scarcely fail to do, when it is 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 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]

[22] 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.

SECTION XI.

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.*

§ 161. 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] and adopted by Mr. Angell in his treatise on Carriers.[3]

[1] Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. R. 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, 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.

* 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, § 160, and 167), 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 a condition relieving him from all responsibility in consequence

[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.

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 that 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

[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 R. Co., 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 contract 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.

carry 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]

[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.

SECTION XII.

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.*

§ 162. 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 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

[1] Hodges on Railways, 615.

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

[3] Watson *v.* Ambergate, Not. & Boston Railw., 3 Eng. L. & Eq. 497; Scotthorn *v.* South Staffordshire Railw., 18 Eng. L. & Eq. 553; Wilson *v.* York, N. & B. Railw., 18 Eng. L. & Eq. 557.

[4] Crouch *v.* London & N. W. Railw., 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. 8.

[6] *Ante*, § 155, n. 3.

pains, have really escaped from a threatening dilemma by falling into more difficulty and doubt, not to say confusion and absurdity, 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 Company.[7]

And in a later case, where oxen were sent from the Crown Arms station on the Shrewsbury and Hereford Railway to Birmingham, that company's line extending to Shrewsbury, and the defendant's 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 dead,

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

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. R. 52; 18 Vt. R. 131; 23 Vt. R. 186; Van Santvoord *v.* St. John, 6 Hill (N. Y.), 158; Hood *v.* New York & N. H. Railw., 22 Conn. R. 1; s. c. 22 Conn. R. 502; Nutting *v.* Conn. R. Railw., 1 Gray, R. 502; Jenneson *v.* Camden & Amb. Railw., Dist. Court Phil. 4 vol. 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 26 1-4 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 defendant's 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 then 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

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

parcel delivered at Lancaster, addressed to a place in Derbyshire, beyond the line of the Lancaster and Preston Railw. Baron *Rolfe*, before whom the cause was 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 *primâ 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, 3 Eng. L. and 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. R. 140, and 23 Ib. 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,' — that the company was not responsible for any injury sus-

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

tained 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, 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. R. 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 *allegata* 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. R. 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 road, 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.

[10] Weed *v.* Sar. & Sch. Railw., 19 Wend. 534; Bennett *v.* Filyaw, 1 Flor.

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

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. R. 332. Same *v.* Johnson, 34 Ill. R. 389.

[11] Noyes *v.* Rut. & Bur. Railw., 27 Vt. R. 110; Wilcox *v.* Parmelee, 3 Sand. 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; Ma. Mutual Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Mallory *v.* Bennett, Id. 234.

In a late English case, Collins *v.* The Bristol and Exeter Railw., 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 lading, given by the Great Western Company, 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 Company.

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

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, November, 1856, and notice

among * 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 * it be the usual course of the carrier's busi-

of appeal to the House of Lords given, 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 Jur. N. S. 1367.

[12] Wibert *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 Railw., 8 M. & W. 421; Crouch *v.* London & N. W. Railw. Co., 14 C. B. 255; 1 Parsons on Cont. 686 – 7, 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. R. 209, it was said, "There has been an attempt to push one department of the law of carriers into any 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. Railw. Co., 8 M. & W. 421, is the only English case much relied upon in favor of any such proposition, and that case is, 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. R. 131. Weed *v.* Saratoga & S. 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

ness to forward goods beyond his route by sailing vessels, he is not liable for not forwarding a particular article by steam-vessel, unless the direction to do so be clear and unambigious.[13]

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 R. 403) I have not seen." See also Nutting *v.* Conn. River Railw., 1 Gray, 502, and Elmore *v.* Naugatuck Railw., 23 Conn. R. 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 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

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

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 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 carrier 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

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*.

[14] Crouch *v.* Great Western Railw., 29 Law Times, 354. 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.

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, *supra*, *post*, § 164, "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. R. 364.

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 defendant's 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 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 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 is delivered to the agent of two connecting lines forming a continuous route, and the package is addressed to a person at the end of the route, and the agent alters the address so as to make it more obvious what course it is to be carried, as by writing "via Strafford" upon it, and delivers 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]

[15] Hempstead *v.* New York Central Railw., 28 Barb. 485.

[16] Michigan S. & N. Indiana Railw. *v.* Day, 20 Ill. R. 375. And in a later case, Illinois Central R. Co. *v.* Johnson, 34 Ill. R. 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.* The 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.

SECTION XIII.

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.*

§ 163. 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 *primâ 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

[1] *Ante*, § 162, and cases there cited; Moore *v.* Michigan Central Railw., 3 Mich. R. 23.

[2] *Ante*, § 162, and notes. Fairchild *v.* Slocum, 19 Wend. 329.

[3] Hood *v.* New York and N. H. Railw., 22 Conn. R. 502. See Elmore *v.* Naugatuck Railw., 23 Conn. R. 457. And in Naugatuck Railw. *v.* Waterbury Button Co., 24 Conn. R. 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*, § 162, and notes.

courts, that receiving goods destined beyond the terminus of the particular railway, and accepting the carriage 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 H. Railway, 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 hinderances 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.* The Rut. & Bur. Railw., 27 Vt. R. 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.* L. & P. Junction Railw. Co., 8 M. & W. 421; Weed *v.* Saratoga & Schenectady Railw. Co., 19 Wend. 534; Farmers' & Mechanics' Bank *v.* Champ. Trans. Co., 23 Vt. R. 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 construct-

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 *primâ 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 coach.[7]

*SECTION XIV.

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, if known, will excuse them.*
7. *Illustrations of the rule.*
8. *Servant may bind company, even when he disobeys their directions.*
9. *Company responsible for the servants of other companies.*

§ 164. 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

ing 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*, § 125, 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 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.

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

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

*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]

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 his 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

[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., 14 Eng. L. &. Eq. 175.

[2] Scotthorn *v.* South Staffordshire Railw., 18 Eng. L. & Eq. 553; Schroeder *v.* Hudson River R., 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. Railw. Co., 12 Iowa R. 348. But the true inquiry is whether the agent was acting within the scope of his employment.

[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

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 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,

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, arrive at the station of another company, the place of their destination, but that company refuse 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, does not include this class, being timber, and that they shall 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., 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 company, or that they in any other way assented to it. See also Norwich & Worcester Railw. *v.* Cahill, 18 Conn. R. 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.

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]

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]

[6] Slim *v.* Great N. Railw., 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 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.* Mills, 34 L. J. 195.

[8] Taff Vale Railw. *v.* Giles, 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 Railw. C. 743; Roe *v.* Birkenhead Railw., 6 Railw. C. 795.

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 act of all the servants of his sub-contractor.[11]

SECTION XV.

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.*

§ 165. 1. It seems to be an admitted principle in the law of carriers, that their obligations and duties may be restricted by the 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

[10] Philadelphia & R. Railw. *v.* Derby, 14 How. 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.

[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.

[1] Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. R. 186. Opinion of *Daniel*, J., in New J. Steam Navigation Co. *v.* Merchants' Bank, 6 How. 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

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 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.

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 them 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 & N. W. Railw. Co., 4 B. & S. 66.

[3] Oxlade *v.* Northeastern Railw. Co., 15 C. B. N. S. 680.

[4] Johnson *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.

[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

*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, dealers, 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

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. R. 231.

[8] Bancroft *v.* Peters, 4 Mich. R. 619.

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] Cox, Brainerd, & Co. *v.* Forcue, 37 Ala. R. 505.

[10] Stale & Burgess *v.* Townsend, 37 Ala. R. 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.

SECTION XVI.

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.*

§ 166. 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]

[1] St. John *v.* Van Santvoord, 25 Wend. 660; s. c. 6 Hill, 157. This case, 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

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 such incidents as are presumed to be familiar to both parties, and in regard to which there cannot ordinarily be any misunderstanding, to implication merely.

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 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 such business, in ignorance of the very elementary usages of the 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

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. R. 211, 212. In Cooper *v.* Berry, 21 Ga. R. 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.

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]

SECTION XVII.

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.*

§ 167. 1. Under the English Carriers' Act,[1] the carrier is not liable for the carriage of articles there enumerated, as "articles

[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 make the law of the contract otherwise, 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 proven to make it the law of the contract between the parties. Berry *v.* Cooper & als. Ex'rs. 28 Ga. R. 543.

[1] 1 Wm. 4 & 11 Geo. 4, 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. Id. Hat bodies, made partly of wool and partly of fur, are not

of * great value in small compass," with certain specified ones, as "money, bills, notes, jewelry," &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]

"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 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

It was said 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, 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 ser-

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 cautelâ* 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.

[4] Butt *v.* Great Western Railw., 7 Eng. L. & Eq. 443. In the case of The

vant, is not *primâ 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]

*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 of a stranger,

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 & Brighton Railw., 31 Law Times, 165.

[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, 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 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. W. Railw., 36 Eng. L. & Eq. 418; Crouch *v.* London & N. W. Railw., 25 Eng. L. & Eq. 287.

[9] Hearn *v.* London & S. W. Railw., 29 Eng. L. & Eq. 494.

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 last case cited is certainly not a little of a manifestation of a disposition, in the English courts, to restore, as far as practicable, the reasonable responsibility of carriers, which under the former decisions, with reference to notices and special contracts, had become uncertain and somewhat problematical.[10]

[10] *Ante*, § 159, 160, 161, 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., 37 Eng. L. & Eq. 286, it was held that the 7th section of the Railway & 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 matters 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 & Northwestern Railw. Co., Appellants, *v.* Robert Clarke Dunham, Respondent (Id. 299), which was a case sent by a county court 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

*SECTION XVIII.

Internal Decay. — Bad Package. — Stoppage in Transitu. — Claim by Superior Right.

1. *Internal decay. Defective package.*
2. *Right to stop* in transitu.
3. *Carrier liable, if he do not surrender the goods, to one having right to stop* in transitu.
4. *Carrier may detain until right is determined.*
5. *Right exists as long as the goods are under control of carrier.*
6. *Most uncertainty exists in regard to capacity of intermediate consignees.*
7. *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.*
8. *Company compellable to solve question of claimant's right, at their peril.*
9. *Conflicting claims of this kind may be determined, by replevin, or interpleader.*
10. *Or the carrier may deliver the goods to rightful claimant, and defend against bailor.*

§ 168. 1. In addition to the general exceptions which the law makes to the liability of carriers, of losses from inevitable

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,'

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] evap-

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 in regard to the liability of the carrier, and signed by the party sending the goods, and be also, in the opinion of the court before whom the case shall be tried, "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, 29 Law Times, 181.

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., 38 Eng. L. & Eq. 432.

[1] *Ante*, § 151, and note 6.

[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. R. 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

oration,[2] or natural decay of perishable articles,[2] the carrier exercising all reasonable care to preserve them,[2] and from the

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 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, Id. Conger *v.* Hudson River R., 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. R. 502; *ante*, § 158. 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,

natural and necessary wear by careful transportation,[2] in the mode to which the carrier is accustomed; or from the defective

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 everything 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 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. R. 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.

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 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 much at length.[3]

2. 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 *bonâ fide* *rights in them.[4] The carrier's interest in this question

[3] Phillips *v.* Clark, 5 C. B. (N. S.) 882. See also Briggs *v.* Taylor, 28 Vt. R. 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] 2 Kent, Comm. 540 *et seq.;* Lickbarrow *v.* Mason, 1 Henry Black. 357;

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.

3. 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.[5]

4. The principal difficulty which arises in such cases, so far as the carrier is 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.[6]

5. 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 warehouse-man;[7] unless, as is

s. c. 6 East, 21; s. c. 2 Term R. 63; 1 Smith, L. C. 388 and notes, where the whole law upon the subject, both English and American, will be found.

This leading case establishes the point, that the vendee may defeat the right of the vendor to stop the goods *in transitu*, by a *bonâ 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.

[5] Litt *v.* Cowley, 7 Taunt. 169; Bothlink *v.* Inglis, 3 East, 381; Syeds *v.* Hay, 4 T. R. 260.

[6] See the cases cited under note 4. 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.

[7] Dodson *v.* Wentworth, 4 Man. & Gr. 1080, where Ch. J. *Tindal* thus states

said in some of *the cases, the vendee, by special contract and understanding, is accustomed to use the warehouse of the car-

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 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 Lan. & Yorksh. Railw. Co., 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 those 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

rier or wharfinger as his own. In such case it is the same, when the goods are deposited in the warehouse of the carrier, or

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 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., endorsed 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) Frères Delafosse." The bill of lading, thus endorsed, was sent by them to the plaintiff Schotsman, who endorsed 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 £1000, 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 said Thomas Woodhead as her master, and with 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.]

warehouse-man, or wharfinger, as if they had reached the warehouse of the vendee himself.[8]

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 Bohtlinck *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; Bohtlinck *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 dispute, 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 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*

[8] 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.

Wentworth *v.* Outhwaite, 10 M. & W. 436. This is the case where the goods were kept by the carrier as warehouse-man 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 warehouse-man 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 Heinecke *v.* Earle, 30 Law Times, 147, in

6. But by far the most difficult questions arise under this head in a class of cases, quite numerous, where the goods are directed

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 anything 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 despatched 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

Nov. 1857, 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.

by a particular route, through successive lines of carriers, and at the intermediate points to the care of particular persons, who

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 a 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 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.

may be wharfingers, forwarding-merchants, warehouse-men, carriers, or combining two or more of these capacities.

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 was 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 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.

7. 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 consignor can send for them, or dispose of them, or give them a new destination, in all these cases the transitus is ended.[9]

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 everything 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 over 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 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 *bonâ 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.* Gloakee, 12 Jur. N. S. 677.

[9] 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. R. 172.

8. 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 unknown party, a thousand miles distant, which renders it of consequence that they should be able to obtain competent counsel upon questions of this character.[10] 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.[11]

9. 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.[12] 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.[13] 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, in order * to settle the rights of the contending parties, if no other adequate remedy exists.

[10] Guilford, Clark, & others *v.* Smith, Eldridge, & Lee, Trustees of the Vermont Cent. Railw., a case involving these questions, 30 Vt. R. 49.

[11] 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.

[12] Gosling *v.* Birnie, 7 Bing. 339 ; Holl *v.* Griffin, 10 Bing. 246.

[13] Burton *v.* Wilkinson, 18 Vt. R. 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.

10. 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.[14] 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.[15]

SECTION XIX.

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 endorsement 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.*

§ 169. 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 *primâ facie* evidence against the carrier of that fact, even between the immediate par-

[14] *Post*, § 172; Swift *v.* Dean, 11 Vt. R. 323; Turner *v.* Goodrich, 26 Vt. R. 707.

[15] 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."

ties 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]

* 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]

[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 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 *primâ facie* evidence that it did contain that amount. Fitzgerald *v.* Adams Express Co., 24 Ind. R. 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. Circuit 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. R. 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 *primâ facie* responsible. 50 Me. R. 339; Great Western Railw. *v.* McDonald, 18 Ill. R. 172.

[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

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

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,

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. Abb. 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 R. 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 R. 43; Bissell *v.* Price, 16 Illinois R. 408.

[4] Howard *v.* Tucker, 1 B. & Ad. 512. See also Cox *v.* Peterson, 30 Alabama R. 608.

[5] May *v.* Babcock, 4 Ohio R. 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.

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 defendant's 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 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 experi-

[6] Harmon *v.* New York & Erie Railw., 28 Barb. 323.

[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 Ex. 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. R. 268. And in Bristol *v.* Rensselaer and 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 La. Ann. 752; Hatchett *v.* Steamboat Compromise, Id. 783.

enced 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 himself, 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 endorsement and delivery of the bill of lad-

[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 R. 518.

[10] Wright *v.* Baldwin, 18 N. Y. Court of Appeals, 428.

[11] Wilson *v.* London & Italian Steamship Co., 12 Jur. N. S. 52.

ing passes to the endorsee all vested as well as contingent rights of action, even though the goods are not, at the time of the endorsement, 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]

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 *primâ 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 nondelivery 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]

[12] Short *v.* Simpson, 12 Jur. N. S. 258.

[13] Ohrloff *v.* Briscoll, 12 Jur. N. S. 675.

[14] Steele *v.* Townsend, 37 Ala. R. 247.

[15] Ill. Central Railw. Co. *v.* Cowles, 32 Ill. R. 117.

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.

*SECTION XX.

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.*

§ 170. 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

[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.

delivered to carriers, and lost by them, have been of the latter character.[3] The American * 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 testimeny[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 there-

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

[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.* Bos. & M. Railw., 26 Maine R. 458; Dibble *v.* Brown, 12 Ga. R. 217.

[5] Snow *v.* The Eastern Railw. Co., 12 Met. 44. 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. R. 51. So also in Illinois. Ill. Cent. Railw. *v.* Copeland, 24 Ill. R. 332.

[6] The Mad River & L. Erie Railw. Co. *v.* Fulton, 20 Ohio R. 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.

by 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 XXI.

Extent of Responsibility for 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. 6. *So also are, money for expenses, books for reading, clothing, spectacles, tools of trade, and many other similar things.*
5. *Not responsible for merchandise as baggage.*
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 English statute.*
9. *In England companies may exclude baggage from cheap trains.*

§ 171. 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]

[7] Draper *v.* Worcester & N. Railw., 11 Met. 505; Moses *v.* Bos. & 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.

[1] Great Northern Railw. *v.* Shepherd, 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. Richards *v.* Wescott, 2 Bosw. 589.

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 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]

[2] Smith & wife *v.* B. & M. Railw. Co., 3 Am. Law Reg. N. S. 126; s. c. 44 N. H. R. 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 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 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, sixty pairs stock for boy's shoes, and two papers shoe-nails," is 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. R. 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 reason-

This question was considered and determined in the House of Lords,[5] where the law lords discussed the question at length. 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 baggage 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

able 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, 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 Chancellor, 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.

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 original contract the plaintiff was not to pay anything 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 tea-spoons, or a Colt's pistol, or surgical instruments, except the passenger be connected with the profession, are not properly

[6] Brooke *v.* Pickwick, 4 Bing. 218; McGill *v.* Rowand, 3 Penn. St. 451. In Whitmore *v.* Steamboat Caroline, 20 Mo. R. 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 Neving *v.* Bay Steamboat Co., 4 Bosw. 225.

[7] Jones *v.* Voorhees, 10 Ohio R. 145.

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

[9] McCormick *v.* Hudson River Railw., 4 E. D. Smith, 81;

a portion of 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 allowed 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

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

[11] Phelps *v.* London & N. W. R. Co., 19 C. B. N. S. 652.

[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 money carried by a passenger as part of his baggage, is thus laid down by *Fletcher*, J.: "Money *bonâ 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. R. 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 (Ind.), 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 *primâ 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.

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

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

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.

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 consent 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

[15] Chicago & Aurora Railw. *v.* Thompson, 19 Ill. R. 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. R. 332.

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

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

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

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 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]

[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, 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. Stewart *v.* London & N. W. R. Co., 10 Jur. N. S. 805. 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. R. Co., 3 H. &. C. 135.

[23] Le Conteur *v.* London & So. W. R. Co., 13 L. T. N. S. 325.

*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 wrongdoer 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.*

§ 172. 1. As a general rule the carrier is entitled to a lien upon the goods carried for freight.[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 from the freight.[3] But the goods must be

[1] Skinner *v.* Upshaw, 2 Ld. Raym. 752. And for advances made for freight and storage by other carriers. White *v.* Vann, 6 Humph. 70; Galena & Chicago Railw. *v.* Rae, 18 Ill. R. 488.

[2] Boggs *v.* Martin, 13 B. Monroe, 243. This lien extends to all the freight upon the goods throughout their transportation which may be advanced by the last carrier or warehouse-man. Bissel *v.* Price, 16 Ill. R. 408.

[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 subject to have damage done by some other party in the transit deducted from his lien. Bowman *v.* Hilton, 11 Ohio R. 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

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 *primâ 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 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

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 warehouse-man, 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 & Wor. Railw. *v.* Hanna, 6 Gray, 539.

[4] Palmer *v.* Lorilard, 16 Johns. 356. Opinion of *Kent*, Chancellor, and cases cited.

[5] Moore *v.* Wilson, 1 T. R. 659. [6] Danes *v.* Peck, 8 T. R. 330.

[7] Hill *v.* Leadbetter, 42 Me. R. 572; *Ante*, n. 3.

[8] Fitch *v.* Newberry, 1 Doug. (Mich.) 1. So, too, if the carrier detain 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. Ct. Rep. 357.

of the owner, and being by them transported to Detroit, consigned to the care of F. who was a warehouse-man 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 wrongdoer, 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 wrongdoer.[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 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, that 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.* Purinton, 2 Hall, 561. There property was sold on a condition which the buyer failed to comply with, and shipped the goods

[9] Robinson *v.* Baker, 5 Cush. 137.

[10] Stevens *v.* Boston & Worcester Railroad, 8 Gray, 262.

[11] Ames *v.* Palmer, 42 Maine R. 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.

[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.

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 devested 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, or 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 wrongdoer. 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 receive goods to be carried, there is no estoppel precluding them from disputing the title of the sender. To trover by such a sender 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 warehouse-men have any lien upon goods for a general balance of account against the owner,[17] more than in other cases of lien.

[14] 20 Wend. 267, 275. [15] Sheridan *v.* New Quay Co., 5 Jur. N. S. 248.

[16] Story on Bailm. § 604; Wolf *v.* Summers, 2 Camp. 631; McDaniel *v.* Robinson, 26 Vt. R. 316.

[17] Rushforth *v.* Hadfield, 6 East, 519; Hartshorn *v.* Johnson, 2 Halst. 108;

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 for the services of other parties, made in the due course of the business.[21] But this only extends to charges connected with the expense of transportation strictly.[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]

15. Payment of freight to a common carrier for the portion of a consignment delivered is no presumptive evidence, either of

Green *v.* Farmar, 4 Burr. 2214; Leonard's Ex'rs *v.* Winslow, 2 Grant, 139. And in Hale *v.* Barrett, 26 Ill. R. 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 warehouse-man or consignee deliver goods upon the receipt of a promissory note of the owner for charges, he loses his lien. Ib.

[18] Crawshay *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 warehouse-men and forwarders. See also Cooper *v.* Kane, 19 Wend. 386; Dawson *v.* Kittle, 4 Hill, 107, as to the effect of usage.

[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 R. 339.

[22] Steamboat Virginia *v.* Kraft, 25 Mo. R. 76.

[23] Fox *v.* McGregor, 11 Barb. 41; Jones *v.* Pearle, and cases *supra*, n. 14.

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 warehouse-man, 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]

*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.*

§ 173. 1. In the absence of a special contract, the carrier is bound to perform his duty, *i. e.* deliver the goods at their desti-

[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., 6 Jur. N. S. 761, in the House of Lords, 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 defendant's dock during the term the ship was detained.

[27] Alden *v.* Carver, 13 Iowa R. 253. But the carrier cannot insist upon payment of freight before he allows the consignee to inspect the goods. Lanata *v.* Grinnell, 13 La. Ann. 24.

nation, 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 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 free the carrier from responsibility for damages incurred by breach of his contract of affreightment.[3] Nor will the acceptance of a part 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 con-

[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. Id. Nettles *v.* S. C. Railway, 7 Rich. 190; Id. 409; *ante*, § 151; Conger *v.* Hudson Riv. R. 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 & North Western Railw. Co., 8 L. T. N. S. 421; s. c. 4 B. & S. 66.

[2] Wilson *v.* York, Newcastle, and Berwick Railw., 18 Eng. L. & Eq. 557; Hughes *v.* G. W. Railw., 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. R. 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 Wisc. R. 407.

[3] Atkisson *v.* Steamboat Castle Garden, 28 Mo. R. 124.

[4] Cox *v.* Peterson, 30 Alabama R. 608.

[5] Steamboat Keystone *v.* Moies, 28 Mo. R. 243.

tract 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]

*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

[6] London & N. W. Railw. *v.* Bartlett, 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; 7 H. & N. 400. See also Baker *v.* Steamboat Milwaukee, 14 Iowa R. 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 N. Y. & 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. R. 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 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.

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 articles when 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]

[8] Lipford *v.* The S. C. Railw., 7 Rich. 409. But see *ante*, § 169, n. 4. 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, 12 Jur. N. S. 372.

[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 & North Western Railw. Co., 3 F. & F. 77.

SECTION XXIV.

Carriers have an Insurable Interest in the Goods.

1. *Carriers may insure for their own benefit.*
2. *A warehouse-man 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.*

§ 174. 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 warehouse-man or wharfinger with whom goods are deposited has an insurable interest in such goods, although there has been no previous authority given to insure by the general owners, nor any notice given to them of the insurance. Such goods are properly described in a policy as goods "in trust." The insurers 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 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]

[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.

[2] Waters *v.* The Monarch Life & Fire Ins. Co., 34 Eng. L. & Eq. 116.

[3] The London & N. W. Railw. *v.* Glyn, 5 Jur. N. S. 1004.

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.

*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.*

§ 175. 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

[4] Seagrave *v.* Union Marine Ins. Co., 12 Jur. N. S. 358.

[1] Hand *v.* Baynes, 4 Wharton, 204. *Ante*, § 173, n. 2; Grieff *v.* Switzer, 11 Louis. An. 324. See also Taylor *v.* Collier, 26 Ga. R. 122; Dear *v.* Vaccaro, 2. Head, 488, Davis *v.* N. Y. & Erie Railw. 1 Hilton, 543; Mich. &c. Railw. *v.* Carter, 13 Ind. R. 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 car-

adventure.[2] In a well-considered English case,[3] Lord *Tenterden*, Ch. J., thus lays 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 a well considered 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

rier, 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.

[2] Sedgwick on Dam. 356.

[3] Brandt *v.* Bowlby, 2 B. & Ad. 932. See also Gillingham *v.* Dempsey, 12 S. & R. 183; Ringgold *v.* Haven, 1 Cal. R. 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. 416; Opinion of court in Rome Railw. *v.* Sullivan, 14 Ga. R. 283; Robinson *v.* Austin, 2 Gray, 564.

[4] Lakeman *v.* Grinnell, 5 Bosw. 625.

[5] Shaw *v.* South Carolina Railw., 5 Rich. 462. So also, where 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. R. 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. R. 263. When 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.

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 ground that the carrier did not offer the porter as a witness.[7]

[7] Boyce *v.* Chapman, 2 Bing. N. C. 222. And upon general principles the plaintiff makes a *primâ facie* case, by showing that the goods did not reach their destination. Story on Bailm. § 529 *a*; Woodbury *v.* Frink, 14 Ill. R. 279; Bennett *v.* Filyaw, 1 Florida R. 403; Bark Oregon, Newberry's Adm. R. 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. Id. 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. Id.

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., 38 Eng. L. & Eq. 335. See *post*, § 183, n. 2. But in a very late English case, Mullett *v.* Mason, 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

And in an action against a railway for negligence, if the plaintiff show damage, resulting from an act of defendants, he makes a *primâ 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]

that the master should forfeit his recognizance and not be delayed in returning with the vessel. The James Seddon, 12 Jur. N. S. 609. But in the case of Gee. *v.* Lancashire and Yorksh. R. Co., 3 Law T. N. S. 328; 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 profits, but only for the particular loss upon the article thus failing to be delivered in proper time. Wilson *v.* Lancashire and Yorkshire Railw. Co. 9 C. B. N. S. 632; s. c. 7 Jur. N. S. 862; Collard *v.* Southeastern Railw. Co., 7 Jur. N. S. 950; Simmons *v.* Southeastern Railw. Co., 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 W. R. Co., 11 Jur. N. S. 797. See also Tardos *v.* Ship Toulon, 14 La. Ann. 429.

[8] Ellis *v.* Portsmouth & Raleigh Railw., 2 Iredell, 138.

[9] Crouch *v.* Great Northern Railw., 25 Law Jour. 137.

[10] Lythgoe *v.* East Anglian Railw., 15 Jurist, 400. 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

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 were in him; otherwise he would pay in his own wrong, if it should turn out the property were in another, since the contract, by construction, is with the party entitled to claim the goods. And whether it be the consignor or consignee will depend upon circumstances readily learned upon inquiry.[14] A warehouse-man 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

much they are lessened in value thereby, and give damages accordingly. Hackett *v.* B. C. & M. R., 35 N. H. R. 390.

[11] Sanford *v.* Housatonic Railw., 11 Cush. 155. But the consignee is *primâ 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. And it is here said the consignee may accept the goods at an intermediate port or place.

[12] Coombs *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.

[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

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 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, in such case, 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]

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 con-

amount he represented their value to be, in case of loss or damage. McCanee *v.* London & Northwestern Railw. Co., 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. R. 337; White *v.* Bascom, 28 Vt. R. 268. See Wing *v.* N. Y. & E. Railw., 1 Hilt. 235. *Semble*, where a contract is made with a railroad 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. Ill. Cent. Railw. *v.* Cowles, 32 Ill. R. 116.

[17] White *v.* Bascom, 28 Vt. R. 268; Green *v.* Clark, 13 Barb. 57; s. c. 2 Kernan, 343.

signee, 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.

SECTION XXVI.

Demurrage.

The nature of the claim.

§ 175 *a*. 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 transport-

[18] Green *v.* Clark, *supra*. And where a box containg 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. J. & G. Metcalfe *v.* L. B. & So. Coast Railw., 31 Law T. 166.

[19] Midland Railw. *v.* Bromley, 33 Eng. L. & Eq. 235.

[20] Phillips *v.* Brigham, 26 Ga. R. 617.

[1] The Apollon, 9 Wheaton, 362.

ation 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.

*CHAPTER XXIV.

COMMON CARRIERS OF PASSENGERS.

SECTION I.

Degree of Care required.

1. *Are responsible for the utmost care and watchfulness.*
2. *Duty extends to everything 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.*
10–12, and notes. *Further discussion of the rule and the cases.*

§ 176. 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 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

[1] Aston *v.* Heaven, 2 Esp. 533. S. P. Frink *v.* Potter, 17 Illinois R. 496.

[2] Christie *v.* Greggs, 2 Camp. 79; Harris *v.* Costar, 1 C. & P. 636; White *v.* Boulton, Peake's C. 81; Sharp *v.* Grey, 9 Bing. 457.

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]

[3] Taylor *v.* Day, 16 Vt. R. 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. Sup. Ct. R. 150; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 192; Fuller *v.* Naugatuck Railw., 21 Conn. R. 557; Hall *v.* Conn. Riv. Steamboat Co., 13 Conn. R. 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. R. 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. Cent. Railw., 26 N. Y. 102, where the company were held liable for an injury resulting 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. R. 326, that carriers of 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 substantially the same as the English rule, and as that adopted in the other states, and in the United States Supreme Court, 13 Pet. Sup. Ct. R. 190, where Mr. Justice *Bar-*

* The fact that injury was suffered by any one while upon the

bour 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. 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. R. 180, 184, for a more full exposition of this general subject of the degrees of care and diligence. Where we said

"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.

We do not think a judge is ever bound to submit to a jury questions of fact

*company's trains as a passenger, is regarded as *primâ facie* evidence of their liability.[6]

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

[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 & Ch. Railw. *v.* Yarwood, 15 Ill. R. 468, 471; Hegeman *v.* The Western Railw., 16 Barb. 353, 356; Holbrook *v.* The Utica & Schen. Railw., 16 Barb. 113; Curtiss *v.* Roch. & Sy. Railw., 20 Barb. 282.

The same rule had obtained in actions against carriers of passengers by coaches. 13 Pet. Sup. Ct. R. 181. See Skinner *v.* L. B. & South Coast Railw., 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 cars 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.* The Western Railw., 16 Barb. 353, was where the plaintiff had sustained an injury by the breaking of an axletree 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 sub-

*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

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

mit 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.* The Madison & Indianapolis Railw., 5 Ind. R. 340; Farish *v.* Reigle, 11 Grat. 697. And in a late case, Alden *v.* N. Y. Cent. Railw., Am. Railw. Times, Feb. 4, 1865, it is reported that the court held the company responsible for a defect in the axletree 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. R. 509; s. c. 15 Ill. R. 468, it is held, that a passenger in a railway car need only show that he has received an injury, to make a *primâ 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 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

out, is good *evidence against the company in an action to recover for the injury.[7] In an action for damages sustained by a

neglect may be correctly defined in the above cases. But in Hunter *v.* Debbin, 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.* The Manchester Railw., 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 Howard (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

leaves the circumstances of their conduct to the jury. See Albright *v.* Penn, 14 Texas R. 290.

In Frink *v.* Potter, 17 Ill. R. 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 axletree 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 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

[7] Fuller & Wife *v.* The Naugatuck Railw., 21 Conn. R. 557.

passenger on a railway, by the breaking down of a bridge, it is no excuse that the bridge was built by a competent engineer.[8]

continential 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

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.* The 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

[8] Grote *v.* The Chester & Holyhead Railw., 2 Exch. 251.

But it seems to have been doubted by the court in this case, whether the company could have been chargeable with any fault,

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 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. R. 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

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 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 & Sy. 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

if they had adopted the best mode of constructing the bridge, and the best materials, under the supervision of a competent

law,) " or show some legal excuse for not doing so." Hence in Sewall *v.* Matton, 9 Mass. R. 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. R. 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 *primâ facie* liable, and imposes upon him the burden of showing some valid excuse. Logan *v.* Matthews, 6 Barr, 417; Story on Bail. § 411; Bush *v.* Miller, 13 Barbour, 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 makes it reasonable to expect of him; anything 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. R. 1, 15; Galena & Ch.

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 *primâ 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*, § 189, n. 1. But in Curtiss *v.* Rochester & Sy. Railw., 18 N. Y. Ct. App. 534, it is said that no *primâ 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. R. 510. The fact that a train was running several hours out of time is presumptive evidence of gross negligence. Ib.

engineer. This seems to be stating a case where the bridge could not have fallen, but by an earthquake or some convulsion of nature, for which the company are in 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

Railw. *v.* Yarwood, 15 Ill. R. 468; Philadelphia & Reading Railw. *v.* Derby, 14 How. (U. S.) Sup. Ct. 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 axletree 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. R. 406; Galena & Chicago Railw. *v.* Fay, 16 Ill. R. 558. See also Wilkie *v.* Bolster, 3 E. D. Smith, 327.

And in a recent English case, Maurce *v.* Eastern Counties Railw., 3 Law T. N. S. 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 returned, 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 R. 157. See also upon the general subject of this note, Black *v.* Carrollton Railw., 10 Louisa. Ann. 33.

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 negligence on the part of the company, and a verdict for £1500 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 were riding upon a free ticket as a newspaper reporter.[10]

[9] Withers *v.* North Kent Railw., 3 H. & N. 969.

[10] Hodges on Railw., 621; Great N. Railw. *v.* Harrison, 26 Eng. L. & Eq. 443; Gillenwater *v.* Mad. & I. Railw., 5 Ind. R. 340. And in Nolton *v.* The Western Railw., 15 N. Y. Court of Appeals, 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 in § 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

But it has been sometimes claimed to admit of some question, whether such passengers 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

company from liability for gross negligence. Ind. Cent. Railw. *v.* Mundy, 21 Ind. 48. See Ohio & Miss. Railw. *v.* Muhling, 30 Ill. R. 9, where it is held that the responsibility of a railroad 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. Cent. 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 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. R. 416.

[11] Phil. & Read. Railw. *v.* Derby, 14 How. 483. The principle of this case has been followed out, 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.

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 and uses a free ticket, having an express 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 re-

[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.

[14] Skinner *v.* L. B. & S. Railw., 2 Eng. L. & Eq. 360; Cl. Co. & Cin. Railw. *v.* Terry, 8 Ohio St. 570. But see Peoria Br. Ass. *v.* Loomis, 20 Ill. R. 235.

[15] Peters *v.* Rylands, 20 Penn. St. 497.

sponsibility 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 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

[16] *Ante*, § 151.

[17] Chicago, Bur., & Quincy Railw. *v.* Hazzard, 26 Ill. R. 373.

[18] Tuller *v.* Talbot, 23 Ill. 357.

care and diligence should be adopted that is consistent with the mode of transportation adopted." [19]

[19] This question is further illustrated in Bowen *v.* New York Central R. R. Co., 18 N. Y. R. 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, or of any party not in privity with such carrier. Thus in Curtis *v.* Rochester & Syracuse Railw., 18 N. Y. R. 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, that if a carriage break down, or run off the rail, this will be *primâ 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. R. 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 ex-

9. As railway passenger carriers are bound to use all reasonable precautions against injury to passengers, it will be natural to 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

tensively 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, 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, that 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, 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 & So. Western Railw., 2 F. & F. 730, by Chief Justice *Erle*.

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, 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 *primâ 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 violence 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]

[21] Great Western Railw. Co. *v.* Faweett; Same *v.* Braid, 1 Moore P. C. C. N. S. 101; 9 Jur. N. S. 339.

[22] Tennery *v.* Pippinger, 1 Wallace, Philadelphia R. 543. See also Thayer *v.* St. Louis, &c., Railw., 22 Ind. R. 26.

[23] Boswell *v.* Hudson River R. R. 5 Bosw. 699.

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 wrong-doers.*
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.*
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.*

§ 177. 1. To the liability of a railway company, as passenger carriers, two things are requisite, — that the company shall be guilty of some negligence 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]

[1] Robinson *v.* Cone, 22 Vt. R. 213; Butterfield *v.* Forrester, 11 East, 60; Simpson *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. R. 507; Collins *v.* Albany & Sch. Railw., 12 Barb. 492. In the late case of Martin *v.* The Great N. Railw., 30 Eng. L. & Eq. 473, a query is made whether, if a passenger is hurt in a station of a railway company,

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]

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.

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. R. 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.* The 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 & Ch. Railw. *v.* Fay, 16 Ill. R. 548. In Fairchild *v.* The California Stage Co. 13 Cal. R. 599, where an injury occurred to a person travelling on a stage-coach, it is held that in case of injury, the presumption is, *primâ facie*, that it occurred by the negligence of the coachman.

[2] Robinson *v.* Cone, 22 Vt. R. 213; Lynch *v.* Nurdin, 1 Ad. & El. (N. S.) 29. In this case, *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.* The Housatonic Railw., 19 Conn. R. 566; Neal *v.* Gillett, 23 Conn. R. 437. In a recent 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

And although the plaintiff's misconduct may have contributed remotely to the injury, if the defendant's misconduct was 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. Daley *v.* Norwich & Worcester Railw., 9 Am. Railw. Times, No. 50; Ranch *v.* Lloyd, *ante*, § 133, pl. 7, 10, 11. The case of Daley *v.* Norwich & Wor. Railw. came before the Supreme Court, 26 Conn. R. 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 acts, or his negligent conduct contributed to it. Daley *v.* Norwich & Worcester Railw., *supra;* Brown *v.* Lynn, 31 Penn. St. 510; Cleveland, Co., & Cin. Railw. *v.* Terry, 8 Ohio St. 570.

But in Singleton *v.* Eastern Counties Railw. 7 C. B. (N. S.) 287, it was held, 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. Co., 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 Hughes *v.* Macfie, 2 H. & C. 744; 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 & Br. & 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, 100 trains passing daily. Bilbee *v.* Same, Id., 584; Stapley *v.* L. &

immediate cause of it, and with the exercise of prudence he might have prevented it, he is not excused.[3]

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]

N. W. R. Co., 11 Jur. N. S. 954; Stubley *v.* L. B. & S. C. R. Co., Id. 954; Wyatt *v.* Great W. R. Co., Id. 825.

[3] Davies *v.* Mann, 10 M. & W. 546; Illidge *v.* Goodwin, 5 C. & P. 190. See also Augusta & Savannah Railw. *v.* McElmurry, 24 Ga. R. 75.

[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 and W. Railw. *v.* Davis, 18 Georgia R. 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.* Roch. and Sy. Railw., 21 Barb. 339; Galena and Chicago Railw. *v.* Fay, 16 Illinois R. 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. R. 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. and Banking Co. *v.* Davis, 19 Ga. R. 437.

[6] Birge *v.* Gardiner, 19 Conn. R. 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

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 it was held, that when 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 would not exonerate the carrier, it

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 of it 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. Bonells *v.* S. Y. & R. D. Nav. Co., 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, 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 pay-

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 live-stock 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]

ing 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 wrongdoer 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.

[8] Keith *v.* Pinkham, 43 Maine R. 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 Phila. & 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,

*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,

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 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 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 Ch., B. & Q. Railw. *v.* Coleman, 18 Ill. R. 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.* Harlem, & N. Y. & N. H. Railways, 6 Duer, 382, and in Chapman *v.* N. H. R., 19 N. Y. Ct. App. 341.

[13] Trow *v.* Vermont C. R., 24 Vt. R. 487; 13 Ga. R. 86.

[14] Lovett *v.* Salem & So. Danvers Railw. Co., 9 Allen, 557; Owens *v.* Hudson River Railw., 2 Bosworth, 374.

[15] Trow *v.* Vt. C. R., 24 Vt. R. 487; Henning *v.* N. Y. & Erie Railw., 13 Barb. 9; Gahagan *v.* Boston & Lowell Railw., 1 Allen, 187.

we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.[16]

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]

[16] Quimby *v.* Vermont C. R., 23 Vt. R. 387; Briggs *v.* Taylor, 28 Vt. R. 180; Patterson *v.* Wallace, in the House of Lords, 1853, 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, 22 Eng. L. & Eq. 202; N. Y. & Erie Railw. *v.* Skinner, 21 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 they attempt to show themselves not guilty of negligence. See Chicago, B. & Q. Railw. *v.* Hazzard, 26 Ill. R. 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, if 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 risks or diminutions 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 to pass between cars in motion, propelled by an engine, without any necessity, 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 & 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, nor they notified of his design to pass, 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. C., B. & Q. Railw. *v.* Dewey, 26 Ill. R. 255. See also C., B. & Q. Railw. *v.* Hazzard, *supra*.

[17] Carroll *v.* N. Y. & H. H. R., 1 Duer, 571–2.

13. If one should expose himself to peril, contrary to the general regulations of the company notified to him generally, and especially by particular notice from the conductor at the time, as by letting his hand remain out of the car window while passing a bridge, it is evidence of gross carelessness upon his part, which will, on that ground alone, justify a verdict against his claim for damages.[18]

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 passen-

[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 limbs 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 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.

gers to give up half a seat, or even whole seats, needlessly occupied by them.

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 affirmative evidence of the negative; but where there is conflicting evidence upon the point, the burden of proof is upon him.[20]

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 consequence 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 railroad 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

[19] Robinson *v.* Fitchb. & Wor. Railw., 7 Gray, 92.

[20] Button *v.* Hudson River Railw., 18 N. Y. Court of Appeals, 248.

[21] Bowen *v.* N. Y. Central Railw., 18 N. Y. Court of Appeals, 408.

[22] Steves *v.* Oswego & Syra. Railw., 18 N. Y. Court of Appeals, 422.

[23] Wild's adm'x. *v.* Hudson River Railw. Co., 24 N. Y. Court of Appeals, 430. See also cases in 5, 6, and 7, Jur. N. S.

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 knee-pan, 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 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 there is any actual damage to the passengers from the construction of a passage which they will naturally take, then the company are responsible for all injuries in consequence,[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

[24] Cornmon *v.* Eastern Counties Railw., 4 H. & N. 781.

[25] Crafter *v.* The Met. Railw. Co., 12 Jur. N. S. 272.

[26] Longmore *v.* Great Western Railw., 19 C. B. N. S. 183. Rigg *v.* M. Sheffield & L. Railw., 12 Jur. N. S. 524.

[27] Gill *v.* Iron Screw Collier Co., 12 Jur. N. S. 727.

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]

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] "1. 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

[28] Lloyd *v.* The General Iron Screw Co., 10 Jur. N. S. 661.

[29] 27 Conn. R. 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 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.

the plaintiff as he was passing the street.[32] And where an engine driver blew off steam at a road crossing, or 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]

*SECTION III.

Injuries by Leaping from the Carriages.

1. *Passengers may recover, if they have reasonable cause to leap from 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.*

§ 178. 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 against by the utmost care of the carriers, is entitled to recover for any injury which he may thereby sustain,[1] where no

[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. 1108; 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. R. Co. *v.* Fullarton, 24 C. B. N. S. 54.

[1] Ingalls *v.* Bills, 9 Met. 1; Eldridge *v.* Long I. Railw., 1 Sand. 89; Stokes *v.* Saltonstall, 13 Pet. 181; Frink *v.* Potter, 17 Ill. R. 406; Southwestern Railw. *v.* Paulk, 24 Ga. R. 356.

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]

4. But where, as in the last case, the person 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, not-

[2] Jones *v.* Boyce, 1 Stark. 493; Ingalls *v.* Bills, 9 Met. 1.

[3] 13 Pet. Sup. Ct. R. 181.

[4] Galena & Ch. Railw. *v.* Yarwood, 15 Ill. R. 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.

withstanding 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, who, 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]

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

[6] Damont *v.* New Orleans & Carrollton Railw., 9 Louis. Ann. 441.

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 passengers 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 leave 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]

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. *Form of the indictment.*
9. *If those having charge of passengers, not* sui juris, *leave them exposed, company not liable.*
10. *No action lies if death caused by neglect of fellow-servant or by machinery.*
11. *Servant liable for consequences of using defective machinery.*

§ 179. 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 rail-

[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.

ways 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.

[3] Blake, Adm'r, *v.* The Midland Railw., 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, 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

* 5. In the American courts, the decisions in the different states will differ, as the statutes are different. The rule laid down in

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 R. 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.* Aub. & Sy. 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. 18, 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 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 and 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,

* Pennsylvania [4] is, that the jury are to estimate damages "by the probable accumulations of a man of such age, habits, health,

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 anything), 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.* The Southeastern Railw. Co., it was held that the father might have an action, under Lord Campbell's Act, 9 & 10 Vic. c. 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 expenses 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

[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. The City of Chicago *v.* Major, 18 Ill. R. 349.

and 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 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]

practical pecuniary benefit is sufficient. Franklin *v.* same Co., 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 late case in California, Fairchild *v.* The Cal. Stage Co. 13 Cal. R. 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.

[6] Carey *v.* The 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.* Cincin. Ham. & Day. Railw., 1 Handy, 481.

[7] Skinner *v.* Housatonic Railw., 1 Cush. 475.

8. 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.[8]

* 9. 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.[9]

[8] 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 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 & W. Railw., Id. 108.

[9] Willetts *v.* N. Y. & Erie Railw., 14 Barb. 585. [See also Hibbard *v.* N. Y. & Erie Railw., 15 Court of Appeals, New York, 455. But the admissions of a

10. 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.[10] * 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.[11]

11. 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.[11]

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*, § 177, n. 1, 2.

[10] Hubgh *v.* New Orleans & Carrollton Railw., 6 Louis. Ann. 495. See *post*, § 170, n. 2, 9, 10; Timmons *v.* Central Ohio Railw., 6 Ohio State, 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. 33 Eng. L. & Eq. 1.

[11] 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. R. 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 everything pertaining to its security, was 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 the company were negligent in employing an incompetent section-agent, the complaint did not sufficiently state a case of negligence against the company.

SECTION V.

Suits where the Injured Party is a Married Woman.

§ 180. 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]

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]

*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. *Not liable for injury caused by stage company, connecting with railway.*
5. *Company excused, by giving proper notice of the course of their trains and the places of changing cars.*

§ 181. 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.

[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.* The Naugatuck Railw., 21 Conn. R. 571.

[4] Cases cited above, 1, 2, 3.

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 R. 379.

[2] Hawcroft *v.* Great N. R., 8 Eng. L. & Eq. 362. See also Denton *v.* The Great Northern Railw., 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 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., 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, 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,

And it has been said, that the liability of a passenger-carrier for not stopping at a certain place and taking passengers, accord-

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 kmown 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 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. R. 386; *ante*, § 131, n. 14. In the later case of Randall *v.* Roper, 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,

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]

* 4. 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]

nor had the plaintiff paid anything 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.* Nicholl, 31 Law Times, 152.

[3] Heirn *v.* McCaughan, 32 Miss. R. 17; N. O. J. & G. R. Co. *v.* Hurts, 36 Id. 660.

[4] Heirn *v.* McCaughan, *supra.*

[5] Hood *v.* N. Y. & N. H. Railw. Co., 22 Conn. R. 1.

[6] *Ante*, § 162. But in Connecticut it has been held, that such a contract by a railway company is *ultra vires*. *Ante*, § 163.

5. 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]

*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 passengers, or those otherwise offensive.*
4. *Carrier liable in tort for breach of duty aside from any contract.*
5. *Purchase of ticket does not constitute a contract.*
6. *Company has a right to impose reasonable regulations as to carriage of passengers.*

§ 182. 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:

[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, and 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.

[1] Hawcroft *v.* The Great N. R., 8 Eng. L. & Eq. 362. In regard to the general duty and liability of common carriers of passengers, or those who held

"They should have made it a condition of their contract, that they would not carry unless there was room." By the by-laws in regard to railways in England, established by the Board of Trade, 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 peaceable 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]

themselves out as such, see *ante*, § 131. 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 accomodated 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.

[2] Hodges on Railways, 553. *Ante*, § 26, n. 6.

[3] Jencks *v.* Colman, 2 Sumner, 221; Markham *v.* Brown, 8 N. H. R. 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. R. 486, where the subject is very elaborately and satisfactorily discussed by Mr. Ch. Justice *Parker*. Galena & Ch. Railw. *v.* Yarwood, 15 Ill. R. 472.

[5] Bretherton *v.* Wood, 3 Bro. & Bing. 54; s. c. 9 Price, 408.

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]

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]

[6] Tattan *v.* Great Western Railw. Co., 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.* Mid. Railw. Co., 19 C. B. N. S. 213; s. c. 11 Jur. N. S. 672.

[7] Hurst *v.* Great Western Railw. Co., 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 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*, § 181, 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. Co., 13 L. T. N. S. 20, before *Crompton*, J. at *Nisi Prius*.

[8] The C. C. & C. Co. Railw. *v.* Bartram, 11 Ohio St. 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.*

§ 183. 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 decided 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 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 that those, which at the time of the trial were prospective, should not be conjectural."

[1] Hodsoll *v.* Stallebrass, 11 Ad. & Ellis, 301; Whitney *v.* Clarendon, 18 Vt. R. 252; Curtis *v.* Roch. & Sy. Railw., 20 Barb. 282; Black *v.* Carrollton Railw., 10 Louis. Ann. 33.

[2] Curtis *v.* Roch. & Sy. Railw., 20 Barb. 282. See also Morse *v.* Auburn & Sy. 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

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]

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.

[3] Collins *v.* Alb. & 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.* Roch. & Syr. 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. R. 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 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

tenanced, is Sandback *v.* Thomas, 1 Stark. 306. See Webber *v.* Nicholas, 1 Ryan & M. 419.

[7] Theobald *v.* Railway Passengers' As. Co., 26 Eng. L. & Eq. 438. But see Curtiss *v.* Roch. and Sy. R., 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. Id. *Ante*, § 158, n. 14, § 161, n. 2.

[8] Ransom *v.* New York & Erie Railw., 15 New York Court of Appeals, 415

[9] Lincoln *v.* Saratoga and Sch. Railw., 23 Wend. 425.

and judgment of the jury who are to consider the actual loss to 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.* The 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

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 greatly bruised and injured, so as greatly to impair health and memory, and be in constant pain, and she had at three successive trials recovered $1,000, $18,000, and $22,250, respectively, the two first of which 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 judicously 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, and of grave consideration and remembrance wherever they have any just application.

15. In actions against common carriers, only such damages

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 reasonable 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., 12 Jur. N. S. 233.

[14] 9 Exch. 341.

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 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]

SECTION IX.

Carriers of Passengers and Goods cannot drive within the Precincts of a Railway Station.

§ 184. We have seen 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 was excluded from this privilege, had no ground of action against the company on that account.[2] But in a later

[15] Hunter *v.* Stewart, 47 Me. R. 419.

[1] *Ante*, § 26, 27, 28.

[2] Barker *v.* Midland Railw. Co., 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

case[3] it was held, that where one was so excluded from driving his omnibus upon the grounds of the company in the same manner 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 *bonâ fide* complaint on behalf of the public interest.[5]

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.* The 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 coachmaker for a breakdown. If such actions were permitted, the courts would be inundated with them."

[3] Marriott *v.* London & Southwestern Railw., 40 L. & Eq. 250.

[4] Beadell *v.* Eastern Counties Railw., 2 C. B. (N. S.) 509.

[5] Painter *v.* L. Br. & S. 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.*
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.*

§ 185. 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]

[1] *Ante*, § 128, 135; McCormick *v.* Hudson River Railw., 4 E. D. Smith, 181.

[2] Sprague *v.* Smith, 29 Vt. R. 421; Hood *v.* New York & New H. Railw., 22 Conn. R. 1; s. c. 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 *v.* Tartt, 26 Ala. R. 733; *post*, § 162; Straiton *v.* New York & New H. Railw.,

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]

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.[3]

5. But in a recent case, where the subject seems to have been a good deal examined, the rule is thus laid down :[4] "If the several 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.[5] And if one carrier so issue his tickets, or

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] Champion *v.* Bostwick, 11 Wend. 572; s. c. 18 Wend. 175.

[4] Ellsworth *v.* Tartt, 26 Ala. R. 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, 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. R. 331.

[5] Cary *v.* Cleveland & Toledo Railw., 29 Barb. R. 35.

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.[6]

7. And where an excurison 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, it was held by the Supreme Judicial Court of Massachusetts, is entitled to recover for the loss or non-delivery of such baggage at the termination of the route.[7]

8. In a recent English case,[8] where the first company sold a 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.

[6] Quimby *v.* Vanderbilt, 17 N. Y. App. 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.

[7] Najac *v.* Boston & Lowell Railroad Co., 7 Allen, 329.

[8] Blake *v.* Great Western R. Co., 7 H & N. 987; s. c. 8 Jur. N. S. 2013.

*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.*

§ 186. 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]

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 expresssion applicable to the subject.[1]

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.*

§ 187. 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

[1] Caldwell *v.* Murphy, 1 Duer, 233; s. c. 1 Kernan, 416; 1 Greenleaf, 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 Mass. Nor in an action

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]

*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 proceeds on the voyage without giving the passenger reasonable opportunity to remove his baggage,

for damages, by reason of collision between two carriages upon the highway, can 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.

[1] Hagan *v.* Providence & Worcester Railw., 3 Rhode Island R. 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, 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; *ante*, § 156, 164, 181.

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 strictly bring themselves 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]

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.*

§ 188. 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 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.

[2] Holmes *v.* Doane, 3 Gray, 328.

[3] Jennings *v.* Great Northern Railw. Co., 13 Law T. N. S. 231. See also Dearden *v.* Townsend, 13 Law T. N. S. 323.

[1] Perren *v.* Monmouthshire Railw. and Canal Co., 20 Eng. L. & Eq. 258. The declaration here stated a contract to carry plaintiff from N. to E., and a

SECTION XIV.

Liability where one Company uses the Track of another.

1. *Statement of the facts of a case.*
2. *Company not liable to passengers for torts committed by strangers.*
3. *Same liability towards passengers coming from other roads as in other cases.*

§ 189. 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 defendants' 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 negligence 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 only that of ordinary passenger-carriers, and did not render them responsible for injuries which he might sustain by the misconduct of other parties;[1] that the

negligent breach of duty in the performance of it, and damages. Plea, payment of 25*l.* into court. Replication, damages *ultra*. Held, the negligence was admitted, and the plaintiff was entitled to recover all damages proved, even beyond the 25*l.*, 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. R. 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, 3 Eng. L. & Eq. 548.

[1] Sprague *v.* Smith, 29 Vt. R. 421. It was argued in this case, that, as the defendants' contract bound them absolutely to carry the freight, and the plain-

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]

3. In a recent case in Massachusetts, it was held, that a railway company, which receives the cars of another company upon its 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,[3] 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.[3]

tiff 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. 5.

[2] Bridge *v.* Grand J. 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, 1 Wallace, Philadelphia R. 264.

[3] Schopman *v.* Boston & Worcester Railw., 9 Cush. 24.

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.*

§ 189 *a*. 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 question 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

[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.

there had been such negligence as to cause a breach of duty, and what would be reasonable under the circumstances.[3]

[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.

NOTE I. TO § 154, *ante*, p. 30.

A man and woman living in another state came into this commonwealth for the purpose of being married, and were married here. A few days afterwards, while they were living here at an inn, she wrote to a broker in that state, with whom, before the marriage, she had deposited property earned by her, to send her a sum of money by an expressman, which the broker did, with instructions to the expressman to deliver it to her upon her personal receipt; but the expressman delivered it to the husband, who absconded with it. *Held*, that under Stat. 1845, c. 304, she might maintain an action in her own name against the expressman for the money, if she had not authorized her husband to receive it, or held him out as her agent to collect money. Read *v.* Earle, 12 Gray, 423.

NOTE II. TO § 160, *ante*, pp. 82, 94.

The first section of the Act of Congress of March 3d, 1851, entitled "An act to limit the liability of ship-owners, and for other purposes," exempts the owners of vessels, in cases of losses by fire, from liability for the negligence of their officers or agents, in which the owners have not directly participated.

The proviso to that act, allowing parties to make their own contracts in regard to the liabilities of the owners, refers to express contracts.

A local custom that ship-owners shall be liable in such cases for the negligence of their agents, is not a good custom, being directly opposed to the Statute. Walker *v.* Transportation Co., 3 Wallace, 150.

The common-law liability of a common carrier for the safe carriage of goods may be limited and qualified by special *contract* with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct.

Thus, where a contract for the transportation of *cotton* from Memphis to Boston was in the form of a bill of lading, containing a clause exempting the carrier from liability for losses by *fire*, and the cotton was destroyed by fire, the exemption was held sufficient to protect the carrier, the fire not having been occasioned by any want of due care on his part.

Where a deposition is taken upon a commission, the general rule is, that

all objections to it of a formal character, and such as might have been obviated if urged on the examination of the witness, must be raised at such examination or upon motion to suppress the deposition. It is too late to raise such objections for the first time at the trial. York Co. *v.* Centr. Railw., 3 Wall. 107. See also cases in 12 Gray, 174, 423, 180, 393, 388.

NOTE III. TO § 169, *ante*, p. 141.

A passenger, who, having a free pass over a railroad for himself, buys a ticket for his wife, and delivers her trunk to the railroad corporation without informing them that it is not his, may maintain an action against them for a loss of the trunk during the carriage.

There is no presumption of law that a passenger on a railroad has read a notice limiting the liability of the railroad corporation for baggage printed upon the back of a check delivered to him, having on its face the words "look on the back," and also printed on a placard posted in the cars, and containing other notices, which he has read. Malone *v.* Boston & Worcester Railroad Corporation, 12 Gray, 388.

Where a bill of lading, signed by a master, shows that a voyage to a particular place named on it is but part of a longer transit which it is understood is to be made by the cargo shipped, and that the cargo is to be carried forward in a continuous way on its further voyage, the master must be presumed to have contracted in reference to the course of trade connected with getting the cargo forward.

In such a case, if any obstacle should intervene, which by the regular course of the trade is liable to occur and for a short time retard the forwarding, the master cannot, from a mere inability to find storage at the entrepot, turn about, and taking the cargo to some near port, store it there, inform the consignees, and depart. He should wait. If there is easy telegraphic communication with the consignees, he should notify to them his difficulty, that they may send him, if they please, instructions. The Convoy's Wheat, 3 Wallace, 225.

NOTE IV. TO § 179, *ante*, p. 206.

An indictment against a common carrier of passengers for the loss by his negligence of the life of a passenger on the St. of 1840, c. 80, which gives the fine to the use of the passenger's executor or administrator, for the benefit of his widow and heirs, must allege that administration has been taken out in this commonwealth. Commonwealth *v.* Sanford, 12 Gray, 174.

*CHAPTER XXV.

TELEGRAPH COMPANIES. — THEIR RIGHTS, DUTIES, AND RESPONSIBILITIES.

1. *The ordinary corporate rights and duties of these companies discussed in other portions of the work.*
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. 3. *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 4. *Discussion of the question of making contracts by telegraphic communication.*

8. *Illustration of the question of resemblance or difference between correspondence by mail or 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.*

n. 8. *Discussion of the question how far telegraph companies are common carriers.*

14. *Case in Kentucky, holding the company responsible only for care and skill in unrepeated messages.*

15 and n. 10. *Discussion of the question of responsibility for messages passing over different lines.*

16. *Statement of some suggested difficulties in establishing a proper rule of damages in such cases.*
17. *All that is required to render the business safe is to understand the messages correctly.*
18. *The ordinary rule of damages applicable to contracts should be applied here.*
19. *The fact that such correspondence is not fully understood by the companies will make no essential difference in the application of the rule.*

20 and n. 15. *Party on discovering mistake must elect whether to adopt it or not.*

21. *Rule of damages adopted in some unreported cases.*

22 and n. 17. *The party entitled to recover penalty is the contracting party.*

23. *The duty to serve all, without discrimination or preference. Disclosing secrets of office.*
24. *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.*

§ 189*b*. 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.

1. We have in other portions of this work 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]

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. We had occasion to discuss and determine many of these points in a case in Vermont, at a comparatively early day, before much had been settled by the courts in regard to them.[2]

[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 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. Co., 29 Vt. R. 127. See also Matteson

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.

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 principal, 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 original is the message delivered at the end of the line.

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.[3]

v. Roberts, 25 Ill. R. 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] "In regard to the proof offered to establish telegraphic communications, 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, 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

7. In a recent case in New York [4] it is held, that where the 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

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. In default of that, its contents may be shown by the next best proof.

"If the course of business is, as in the cities, 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 have a sufficient time before the trial to enable him to do so; 1 Greenleaf Ev. sec. 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 were 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."

[4] Trevor *v.* Wood, 41 Barb. 255. The rule in 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. 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

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 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.

9. Where one employs a special agent, who is not the regular operator, to transmit a message across the wires, he takes the responsibility of correct transmission, whether such would have been the case or not, if he had employed the usual agencies of telegraphic communication.[5] 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

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 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.

[5] Dunning *v.* Roberts, 35 Barb. 463.

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.[6] 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 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 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.

[6] 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.

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.[7]

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 insurers 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.[8]

[7] M'Andrew *v.* The Electric Telegraph Co., 33 Eng. L. & Eq. 180; s. c. 17 Com. B. 3.

[8] Thus in the case cited in n. 7 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 Cal. R. 422, it is expressly decided that telegraph companies are common carriers While in Birney *v.* New York & Washington Tel. Co., 18 Md. R. 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 ac-

14. The rule of responsibility of telegraph companies seems to be as correctly laid down in a late case in Kentucky as in any

cording to its established rules, and that such rules, if known to the employer, or if he has the means of knowing them from part of the contract and undertaking of the company, bind him. 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 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 connusant 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 Courts of Common Pleas, Ohio, in the case of Brown *v.* Lake Erie Telegraph Co., 1 Am. Law. Reg. 685, it was decided 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.

other.[9] It was here held, that one who sends a message under the knowledge of the ordinary notice, limiting the responsibility

[9] Camp *v.* Western Union Telegraph 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, the same rule is laid down with the qualification, that knowledge of this limitation of 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 notes, 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 anything 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 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 proposi-

of the company for unrepeated messages, as already stated, is presumed 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.

15. In the case of the New York, Albany, and Buffalo Telegraph Company[9] 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

tion 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 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 N. Y., 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 defendant's operators the message as delivered to the correspondents required them to purchase $ 7000 instead of the smaller sum; in consequence of which error the plaintiff suffered serious loss. *Held*, that they could not recover the amount of the company. Breese *v.* United States Tel. Co., 45 Barb. 274.

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, but decided by a divided court, but it 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.[10]

16. There has been considerable discussion in the courts in regard to the proper rule of damages, in case of the default of

[10] 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 N. Y., and about 3 P. M., on the 23d Nov., delivered to the defendants, at Hamilton, the following message addressed to N., paying the charge to N. Y.: "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 N. Y. 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 N. Y., 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 Co. 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.

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.[11]

17. 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.

18. 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.[12] 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.[13]

[11] Opinion of *Jervis*, C. J., in McAndrew *v.* The Electric Tel. Co., 33 Eng. L. & Eq. 180, 185; s. c. 17 Com. B. 3.

[12] Griffin *v.* Colver, 16 N. Y. R. 489.

19. 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 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.

20. There is one point decided in a somewhat early case[14] 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 accord-

[14] Washington & New Orleans Tel. Co. *v.* Hobson, 15 Gratt. 122.

ingly. 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.[15]

[15] 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 company 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 purposes 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 a purpose of taking the profits, if any, but only 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 apprized 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 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

21. 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.[16] In the 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, that 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.[16]

22. Where the statute imposes a penalty for refusing to send a message across the line of the company, to be received 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 re-

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. Washington & N. O. Tel. Co. *v.* Hobson & Son, 15 Gratt. 122.

[16] 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, where it was said to have been 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 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. Leonerd & Burton *v.* N. Y., Albany, & Buff. Tel. Co., fifth Dist. Sup. Court.

cover the penalty should have been in the name of the first company.[17]

23. 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 collect-

[17] Thurn *v.* Alta Tel. Co., 15 Cal. R. 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 2nd, 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 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. R. 472.

ing 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.[18] 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.[19] The wonder is that any one should ever have supposed that such a disclosure could incur a penalty under the statute.

24. 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 already 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 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.[20] 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.[21]

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 instru-

[18] Reuter *v.* Electric Tel. Co., 6 Ellis & Bl. 341.

[19] Henisler *v.* Freedman, 2 Parsons, 274.

[20] Reg. *v.* United Kingdom E. 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.

[21] Attorney-General *v.* The United Kingdom Electric Telegraph Co., 30 Beav. 287; s. c. 8 Jur. N. S. 583.

ments used by them, whether posts or wires.[22] 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[23] 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 companies 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.[24] There can be no question of the duty of the

[22] Dickey *v.* Maine Tel. Co., 46 Me. R. 483; s. c. 8 Am. Law Reg. 358.

[23] Submarine Tel. Co. *v.* Dickson, 15 C. B. N. S. 750; s. c. 10 Jur. N. S. 211.

[24] 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

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.[25]

5. There is one decision in regard to these companies by the Supreme Court of Nova Scotia[26] 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, 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.

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.

[25] 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. 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.

[26] The Nova Scotia Tel. Co. *v.* Am. Tel. Co., 4 Am. Law Reg. N. S. 365.

CHAPTER XXVI.

MANDAMUS.

SECTION I.

General Rules of Law governing this Remedy.

1. *Regarded as a supplementary remedy.*
2. *Mode of procedure.*
(1.) *Matter of discretion.*
(2.) *Alternative writ.*
3. *Proceedings in most of the American courts.*
4. *English courts do not allow application to be amended.*
5. *Recent English statute has essentially simplified proceedings.*
6. *Mode of trying the truth of the return.*
7. *Costs rest in the discretion of court.*
8. *Mode of service.*
9. *By late English statutes, mandamus effects specific performance.*

§ 190. 1. THE office of the writ of mandamus is very extensive. It is the supplementary remedy where all others fail. Lord *Mansfield* says,[1] "It was introduced to prevent disorder, from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." "If there be a *right* and no other specific *remedy* this should not be denied.[2]" The general rules applicable to the use, and the mode of obtaining this writ, are sufficiently discussed in the digests, abridgments, and elementary works, under this title.[3]

[1] Rex *v.* Barker, 3 Burr. 1265. See Woodstock *v.* Gallup, 28 Vt. R. 587. People *v.* Head, 25 Ill. R. 325. Draper *v.* Noteware, 7 Cal. R. 276. The same principles are declared by Lord *Ellenborough*, in Rex *v.* Archbishop of C. 8 East, 213, 219; 6 Ad. & Ellis, 321. And where there is any other equally efficacious remedy this writ will not lie. Bush *v.* Beavan, 1 H. & C. 500; 32 L. J. Exch. 54. *Post*, § 199, pl. 3.

[2] Commonwealth *v.* Pittsburg, 34 Penn. St. 496; Fremont *v.* Crippen, 10 Cal. R. 211. In this last case it was held mandamus would lie to compel the sheriff to execute a writ of possession, although there might be either a civil action or a criminal prosecution against him for the refusal, since neither of these remedies would do full justice to the complainant.

[3] 12 Petersdorff, Ab. 438*; 6 Bac. Ab. 309, 418, tit. Mandamus; 3 Black.

2. The mode of proceeding in obtaining the writ is controlled very much by statute in England at the present time, and in most * of the American states. There are some few points which are of general application.

(1.) The power of granting the original prerogative writ of mandamus in England was confined to the Court of King's Bench,[3] and in most of the American states it is given, by statute, to the highest court of law of general jurisdiction.[3] This prerogative writ seems anciently to have been issued to inferior jurisdictions by the Court of Chancery in England, but not to the King's Bench.[4] This writ is not demandable as of right, but is awarded in the discretion of the court.[5]

(2.) The form of application is either by motion in court, and

Comm. 110, 264; 1 Kent, Comm. 322; Curtis's Digest, 333. And that the party may have some remedy in equity will not preclude this remedy. But see *infra*. Nor that an indictment will lie. *Post*, § 199. And it is no bar to this remedy that the party might by statute build the work, at the expense of the other party, by order of a justice. Reg. *v.* The Norwich & B. Railw., 4 Railw. C. 112. The legislature empowered the board of supervisors of the county of New York to cause to be raised and collected a sum not exceeding $ 80,000 to meet and pay whatever sum up to that amount might be found due to the contractors with the commissioners of records, and authorized the comptroller to pay "said amount when it should be judicially determined." The contractor not having the power to bring action and obtain judgment against the supervisors in the regular manner, it was held that this was not the intention of the legislature, and that, in the absence of any specific directions in the act as to how this judicial determination should be obtained, it would be unreasonable to infer that any other remedy was intended than that attainable by mandamus; and that application for mandamus was the proper remedy for the contractors, upon the refusal of the comptroller to pay them the amount certified by the commissioners to be due them. People *v.* Haws, 34 Barb. 69. And see, to the same point, Regina *v.* Port of Southampton, 1 E. B. & S. 5; s. c. 7 Jur. N. S. 990; 30 L. J. Q. B. 244. And where a new right has been created by act of Parliament, the proper mode of enforcing it is by mandamus at common law. Simpson *v.* Scottish Union Fire & Life Ins. Co., 9 Jur. N. S. 711; s. c. 32 L. J. Ch. 329. Commonwealth *v.* Pittsburg, 34 Penn. St. 496.

[4] The Rioters' Case, 1 Vernon, 175; Ang. & Ames on Corporations, § 697. But see R. *v.* Severn & Wye Railw., 2 B. & Ald. 646; R. *v.* Commissioners of Dean Inclosure, 2 M. & S. 80; R. *v.* Jeyes, 3 Ad. & El. 416.

[5] Rex *v.* Bishop of London, 1 T. R. 331, 334; Rex *v.* Bishop of Chester, Id. 396, 404; Id. 425; 2 T. R. 336. People *v.* Auditor of Public Accounts, 33 Ill. R. 9; s. c. 3 Am. Law Reg. N. S. 332. And the court will not entertain jurisdiction unless substantial interests are involved. Id.

the production of affidavits in support of the ground of the motion, in which case, if the motion prevails, a rule to show cause why the writ should not issue, or an alternative mandamus issues upon the *ex parte* hearing, and the definitive hearing is had upon the return of the rule, or the return to the alternative writ.

3. The more common practice in the American courts (which often hold but one or two short sessions annually in a county, and where, by consequence, such formal proceedings would be attended with embarrassing delays) is, by formal petition, alleging in detail the grounds of the application, which is served upon the opposite party, and all parties supposed to have an interest in the questions involved, a sufficient time before the term to give an opportunity for taking the testimony upon notice; and, upon the return of the petition, the case is heard upon its general merits; and in either form, if the application prevails, a peremptory mandamus issues, the only proper return to which is a certificate of compliance with its requisitions, without further excuse or delay.[6]

[6] Hodges on Railways, 640, 641, 642, 643, 644. It is first indispensable to demand of the party, against whom the application is to be made, to perform the duty, and the party must, it would seem, be made aware of the purpose of the demand. The King *v.* Wilts & Berks Canal Navigation, 3 Ad. & Ellis, 477; The King *v.* Brecknock & Abergavenny Canal Navigation, 3 Ad. & Ellis, 217. People *v.* Romert, 18 Cal. R. 89. The refusal must be of the thing demanded, and not of the right merely. The King *v.* Northleach & Witney Roads, 5 Barn. & Ad. 978. The refusal must be direct and unqualified, but may be made as effectual, by silence as by words or acts, but the party should understand that he is expected to perform the required duty, upon pain of the legal redress being resorted to, without further delay. The Queen *v.* Norwich & Brandon Railw., 4 Railw. C. 112; The Queen *v.* Bristol & Exeter Railw., 4 Q. B. 162. But this should be taken, as a preliminary question, according to the English practice. Queen *v.* Eastern Counties Railw., 10 Ad. & Ellis, 531. But in Commonwealth *v.* Commissioners, 37 Penn. St. 237, a demand was held unnecessary in the case of public officers neglecting to do their duty.

Conditions precedent must be shown to have been performed.

But the mere requisition of an act of Parliament that parties claiming damages, by reason of a railway company's works, shall enter into a bond to prosecute their complaint and pay their proportion of the costs, before the company should be obliged to issue their warrant to summon a jury, and if not so done, the company might give notice, requiring the same to be done before commenc-

* 4. The general rule of the English courts seems to be, that if the first application is denied on account of defects in the affidavits, not to permit a second application to be made; and the rule extends to other writs, resting in the discretion of the court.[7]

ing the inquiry, was held not to be a condition precedent, unless required by the company. The Queen *v.* The North Union Railw., 1 Railw. C. 729.

And where an umpire failed to make an award, it was held the company might be compelled, by mandamus, to issue a warrant for the sheriff to assess the compensation, and no formal demand was necessary. Hodges on Railways, 642, and note; South Yorkshire & Goole Railw., *in re* 18 Law Jour. (Q. B.) 53. A return stating an excuse for non-compliance with a peremptory writ of mandamus, is not admissible. Regina *v.* Ledgard *et als.* Mayor, &c. of Poole, 1 Q. B. 616. Application by the prosecutor for leave to withdraw his plea and argue the case on the return refused. R. *v.* Mayor of York, 3 Q. B. 550; Strong, Petitioner, &c., 20 Pick. 484.

It is the practice for different persons, in the same or similar situation, to unite in the same application for a mandamus, and it is said but one writ can issue in such a case. Rex *v.* Montacute, 1 Wm. Black. 60; Rex *v.* Kingston, 1 Strange, 578 (note 1); Scott *v.* Morgan, 8 Dowl. P. C. 328. But it seems to be considered that where the rights are distinct and wholly independent, one writ will not be awarded, but several, and therefore the application should be several. Reg. *v.* Chester, 5 Mod. 11; The case of Andover, 2 Salk. 433; Smith *v.* Erb. 4 Gill (Md.), 437; State *v.* Chester & Evesham, 5 Halst. 292. And the petitioner for a mandamus must set forth clearly his interest in the matter which he presents as the ground of his application. Fleming, *ex parte*, 2 Wallace (U. S.), 759.

But several connected matters, which are not repugnant, may be included, by way of defence, in the return. Reg. *v.* Norwich, 2 Salk. 436; Wright *v.* Fawcett, 4 Burrow, 2041; Rex *v.* Churchwardens of Taunton, 1 Cowp. 413.

Upon a mandamus to restore a corporate officer to his functions, the return should specify the grounds of the amotion. Commonwealth *v.* The Guardians of the Poor of Philadelphia, 6 Serg. & Rawle, 469, unless the officer were removable upon the mere motion of the corporation. Rex *v.* Guardians of Thame. 1 Strange, 115. It is not a sufficient reason for setting aside a peremptory mandamus that a previous alternative writ had not issued. Knox County *v.* Aspinwall, 24 How. (U. S.) 376.

[7] Queen *v.* Manchester & Leeds Railw., 8 Ad. & Ell. 413. And the same rule obtains where the first writ is denied because no sufficient demand had been made, and a subsequent demand is made. *Ex parte* Thompson, 6 Q. B. 721. But it is apprehended no such rule of practice could be enforced in this country and very few, we think, would regard it as desirable. It seems to be relaxing in England, where the alteration of the affidavits is mere form. Regina *v.* The G. W. Railw., 5 Q. B. 597, 601; Regina *v.* The East Lancashire Railw., 9 Q. B.

* 5. But the late Common-law Procedure Acts in England, 1852, 1854, apply to this class of writs, and have essentially simplified the proceedings, and rendered them more conformable to reason and justice than in some of the American courts even,[8] the rule for the issuing of the alternative writ being now, in all cases, made absolute in the first instance, and the whole hearing had, upon the return, which in our practice is still further simplified, by admitting the party to make answer to the petition, alleging the grounds of his refusal, which are tried at once.[9]

980. And in Reg. *v.* Derbyshire, S. & W. Railw., 26 Eng. L. & Eq. 101, the writ was amended, as to the name of the company. Reg. *v.* Eastern Counties Railw., 2 Railw. C. 836, amendment allowed. Regina *v.* Justices of Warwickshire, 5 Dowl. 382; Reg. *v.* Jones, 8 Dowl. 307; Shaw *v.* Perkins, 1 Dowl. (N. S.) 306; Reg. *v.* Pickles, 3 Q. B. 599, n. State *v.* Hastings, 10 Wisc. R. 518, 525.

[8] And by 23 and 24 Victoria, Ch. 126, § 32, costs are to be allowed against the defendant where an absolute writ is granted unless otherwise specially directed by the courts.

[9] Walter *v.* Belding, 24 Vt. R. 658; Rogers, *ex parte*, 7 Cowen, 526. In the American states the statute of 9 Anne, allowing the prosecutor to traverse the return to the writ or the answer to the petition, and for the court to determine the truth, either upon affidavit or by the verdict of a jury in their discretion, has been pretty extensively adopted, either in practice or by statute. The People *v.* Beebe, 1 Barb. Sup. Ct. 379; The People *v.* The Commissioners of Hudson, 6 Wend. 559; Smith *v.* Commonwealth, 41 Penn. St. 335.

Where the case is fully heard upon the petition or rule to show cause, and there is no dispute in regard to the facts, the court will not delay, for the issuing of the alternative writ and the return thereto, but will in the first instance issue the peremptory mandamus. *Ex parte* Jennings, 6 Cow. 518; The People *v.* Throop, 12 Wend. 183. The rule for the peremptory mandamus is sometimes, in the first instance, made *nisi*, to allow the respondents to consult, if they will comply with the requirements of the judgment. Walter *v.* Belding, 24 Vt. R. 658. Or sometimes this is done to allow the parties to arrange the matter, or the court to consider the case. Rex *v.* Tappenden, 3 East, 186.

The court have such control over their own judgments, that, if a peremptory writ of mandamus be unfairly obtained, it will be set aside upon motion. The People *v.* Everett, 1 Caines, 8.

Courts enforce compliance with the peremptory writ by attachment, as also a return to the alternative writ, without requiring the issue of an *alias* and *pluries*, as in the early English practice. The cases are not altogether agreed, whether defects in the writ are cured by admissions in the return, but upon general principles of pleading it would seem they are. The King *v.* Coopers of Newcastle-upon-Tyne, 7 T. R. 548. But see Reg. *v.* Hopkins, 1 Q. B. 161. But where an alternative mandamus is issued, and the defendants make their return, and the relators, instead of demurring, take issue upon the material allegations in

6. If falsehood is alleged in the return to the alternative mandamus, it was the practice at common law to drive the party to his action for a false return. But by statute in England, and generally by practice in this country, the question is tried in the court issuing * the writ, and the remedy there applied, damages and costs being given in the discretion of the court, and execution enforced.

7. Costs in all the proceedings for mandamus rest in the discretion of the court, unless controlled by statute. By the English practice it is common to award costs where the application is denied, but not always where it prevails.[10] The more general and the more equitable rule in regard to costs, in proceedings where the court have a discretion, in that respect, is to allow costs to the prevailing party, unless there is some special reason for denying them.[11]

the return, they thereby admit that, upon its face, the return is a sufficient answer to the case made, by the alternative writ. And if no material fact is disproved upon the trial, the defendants will be entitled to a verdict in their favor. The People *ex rel.* Kipp *v.* Finger, 24 Barb. 341. The return should set forth an available justification for defendant's refusal to do the act sought to be enforced, and it may allege different independent facts as furnishing such justification.

[10] Reg. *v.* Mayor of Bridgenorth, 10 Ad. & Ell. 66; Reg. *v.* The Eastern Counties Railw., 2 Q. B. 578, 579, and cases cited by counsel. Reg. *v.* East Anglian Railw., 22 Eng. L. & Eq. 274. 1 Wm. 4, c. 21, § 6, makes costs discretionary with the courts, in England. 23 and 24 Victoria, c. 126, § 132. Regina *v.* St. Saviour, 7 Ad. & Ell. 925. See Regina *v.* Brighton & South Coast Railw., 10 Law T. N. S. 496.

[11] Reg. *v.* Thames & Isis Commissioners, 8 Ad. & Ell. 901, 905; 5 Ad. & Ell. 804; Reg. *v.* Fall, 1 Q. B. 636; Reg. *v.* Justices of Middlesex, 6 Eng. L. & Eq. 267, unless strong reasons for denying costs exist; 1 Q. B. 751.

Where the prosecutor omitted to proceed with a mandamus after a return had been made, the Court of Queen's Bench compelled him to elect either to proceed or pay the costs. Reg. *v.* Mayor of Dartmouth, 2 Dowl. (N. S.) 980. If the *quo warranto*, mandamus, or other like writ, is procured by the real party in interest, who is able to pay costs, to be prosecuted by some one, not able to pay costs, the Court of Queen's Bench will grant a rule, requiring the real party to pay costs. Reg. *v.* Greene, 4 Q. B. 646. See also a general rule, adopted immediately after the decision of the last case, Easter Term, 1843, requiring a formal rule, for payment of costs in mandamus, to be drawn up immediately on reading all the affidavits on both sides, 4 Q. B. 653. The rule for costs is decided upon the reading only of the affidavits, with reference to which the rule

8. Service of such process, and indeed of all process, by summons, in England, is by delivering the original where there is but one person summoned, and where there are more than one, by showing the original, and delivering a copy to each defendant but *one, and the original left with such one. But service by copy of a writ of mandamus was held sufficient.[12]

9. By the latest English statutes upon the subject of mandamus,[13] any party requiring any order, in the nature of specific performance, may commence his action in any of the superior courts of common law in Westminster Hall, except in replevin and ejectment, and may indorse upon the writ and copy to be served, that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus, commanding the defendant to fulfil any duty, in the fulfilment of which the plaintiff is personally interested. And if a mandamus is awarded, it may issue peremptorily in the first instance, in aid of the execution, for damages and costs. The form of the writ is very brief, and compliance with its requisition is to be enforced by attachment. The prerogative writ is still retained, but its use, and also that of decrees for specific performance in equity, seem to be pretty effectually superseded by these provisions.[14]

is drawn up. Reg. *v.* St. Peter's College, 1 Q. B. 314, overruling Rex *v.* Kirke, 5 B. & Ad. 1089.

The parties are, in the English cases, required to pay costs occasioned by their delay. Reg. *v.* Mayor of Cambridge, 4 Q. B. 801. But where the judge makes a mistake, the parties who come to defend his ruling, which they are bound to suppose correct, do not pay costs. Reg. *v.* London & Blackwall Railw., 3 Railw. C. 409, and note.

The party who institutes proceedings for mandamus, which he is compelled to abandon, by personal misfortune, as being pauperized by the loss of his trade, must still pay costs, as the court could only conclude he had no grounds to support his petition. Reg. *v.* London & Blackwall Railw., 4 Jurist, 859. See also Morse, Petitioner, 18 Pick. 443.

[12] Reg. *v.* Birmingham & Oxford Railw. Co., 16 Eng. L. & Eq. 94. The conductor of a railway train in some of the states is regarded as a "hired agent" of the company, within the meaning of the statute allowing the service of process upon such agent. New Albany & Salem Railw. *v.* Grooms, 9 Ind. R. 243.

[13] 17 & 18 Vict. ch. 125.

[14] A mandamus to a local board of health, constituted under 11 & 12 Victoria,

SECTION II.

Particular cases where Mandamus lies to enforce Duty of Corporations.

§ 191. The opinion of *Jervis*, Ch. J., in the case of York & North Midland Railway *v.* Reg.,[1] is perhaps the best commentary

ch. 63, recited that the prosecutor had been injured by the board in the prosecution of its powers under the act; that he had demanded compensation from the board, and that they had denied all liability, and commanded the board to compensation to be made to him out of the general or special rate to be levied under the act. The return stated that the board had not denied all liability, and that it was always ready to make compensation, as soon as it had been duly ascertained under the act; that it had not as yet been so ascertained; nor had the prosecutor as yet taken any steps to ascertain the amount, nor notified the board of the amount of his claim, nor appointed nor given notice to appoint an arbitrator. This return was traversed, generally; and on the trial it was found that the board had denied all liability, and a verdict was entered for prosecutor. On a motion to enter the verdict on the rest of the return for the board, and to enter judgment for the board, Held, that the mandamus was good, and that the prosecutor was entitled to a verdict on the whole of the return, and to a peremptory mandamus, on the ground that, as there did not appear by the return to be any dispute as to the amount, the rest of the allegations in the return, apart from the traverse of denial of liability, were immaterial. Regina *v.* Burslem Board of Health, 5 Jur. N. S. 1394; s. c. 28 L. J. Q. B. 345. And generally, where a debt is of such a nature that mandamus will be granted to enforce its payment, it is not necessary that the amount of the debt should be previously ascertained, but such amount may be ascertained in the verdict of the jury in the action in which mandamus is claimed. Ward *v.* Lowndes, 5. Jur. N. S. 1124; s. c. in Exch. Cham. 1 L. T. N. S. 268; Ellis & Ellis, 940. But see McCoy *v.* Harnett County, 5 Jones Law, 265.

[1] 18 Eng. L. & Eq. 199. "Upon these facts several points arise: First, does the statute of 1849 cast on the plaintiffs in error a duty to make this railway? Secondly, if it does not, is there under the circumstances a contract between the plaintiffs in error and the land-owners, which can be enforced by mandamus? Thirdly, and failing these propositions, does a work, which in its inception was permissive only, become obligatory by part performance? These questions will be found upon examination to exhaust the subject, and to comprehend every view in which the mandamus can be supported. In substance, do these acts of parliament render the company, if they do not make this railway, liable to an indictment for a misdemeanor, and to actions by the party aggrieved? For if they do not, a mandamus will not lie, and thus the question depends entirely upon the construction of the special act, and the statutes incorporated therewith.

we could give upon the present state of the English law upon this subject.

The act of 1849 may cast the duty upon the plaintiffs in error, in one of two ways; it may do so by express words of obligation, or it may do so by words of permission only, if the duty can be clearly collected from the general purview of the whole statute. The words of the 3d section of the act of 1849, 'it shall be lawful for the said company to make the said railway,' are permissive only, and not imperative, and it is a safe rule of construction to give to the words used by the legislature their natural meaning, when absurdity or injustice does not follow from such a construction. Indeed, if there were any doubt upon this subject, other parts of the statute referred to in the argument clearly show that these words were intended to be permissive only. The distinction is well put by my brother *Erle:* 'The company are permitted at their option to take lands, turn roads, alter streams, and exercise other powers, and these matters are made lawful for them; but they are commanded to make compensation for lands taken, to substitute roads for those they turn, and to perform other conditions relating to the exercise of their powers, and these matters are required of them.' It seems clear, therefore, that the duty is not cast upon the plaintiffs in error by the express words of the statute of 1849; and, indeed, it was not so urged in the argument; nor was it so put by Lord *Campbell* in his judgment in the court below. But it does not follow, merely because the words of the 3d section are permissive only, that there is no duty cast upon the plaintiffs in error, by the statute taken altogether, to make this railway. This point was not relied upon in this case in the court below, but it was made the distinct ground of a decision in another case in that court (The Queen *v.* The Lancashire & Yorkshire Railw. Co.), and was much pressed in the argument before us in support of this judgment.

"It becomes necessary, therefore, to examine the statute in its general provisions, and to consider the grounds on which the Court of Queen's Bench proceeds in the case of the Queen *v.* The Lancashire & Yorkshire Railw. Co., 1 E. & B. 228; 16 Eng. L. & Eq. 328. We agree with Lord *Campbell*, that the portion of the line between Market Weighton and Cherry Burton, to which the mandamus applies, is not to be considered as a separate railway, or even as a separate branch of a railway, but it is to be treated as if in its present direction it had been included in the act of 1846. The acts, then, taken together, in substance, recite that it will be an advantage to the public if a railway is made from York to Beverley, through Market Weighton and Cherry Burton, according to certain plans and sections deposited, as required by the practice of parliament, and referred to in the statute, and that the plaintiffs in error are willing to make that railway. On this basis the whole provisions are founded. It has been proved that the work will be advantageous to the public; it is assumed it will be profitable to the company, and that, therefore, they will willingly undertake it. Accordingly, the company are empowered to make this line. If they do make it they may take land; but if they do take land they must make compensation. If necessary, they may turn roads, or divert streams; but if they

SECTION II *a*.

Mandamus the appropriate Remedy to restore Officers and Members of Corporations to the Discharge of their proper Functions, where they have been deprived of the same through the agency of the Corporation.

1. *The writ formerly granted only to restore to public office.*
2. *Now granted in all cases where of value and sufficiently permanent.*
3. *Not available, where election annual and facts traversed.*
4. *Claimant must have permanent and vested interest.*

§ 191 *a*. 1. It does not come within the scope of this work to examine with minuteness all questions arising upon the law of

do, they must make new roads and new channels for the streams they alter. Similar provisions pervade the whole statute, and throughout the command waits upon the authority, and the distinction between 'may' and 'must' is clearly defined. But as it is manifest that such general powers must stop competition, and may, to a certain extent, be injurious to land-owners on the line, the compulsory power to take land is limited to three years, and the time for making the railway to five, after which the powers granted to the company cease, except as to so much of the line as shall have been completed, and the land, if taken by the company, reverts, on certain terms, to the original proprietors. An argument might have been founded on the terms in which the latter provision is contained. By the 10th section of the act of 1849, it is enacted that the railway shall be completed within five years from the passing of this act. That section was not referred to in the argument for this purpose, but it might be said that these words were compulsory, and imposed a duty upon the company to make the line. The context of the section, however, when examined, shows that such is not the meaning of it. If not completed within five years, the powers of the act are to expire, except as to so much of such railway as shall have been completed. If the section were intended to be obligatory, it would not contain that exception which contemplates that the line may be made in part. It is inconsistent to suppose that the legislature would say to the company in the same section, you may complete a part only, if you can, in five years, and then as to that part the powers of the act shall continue, but you must complete the entire line in that time. Upon the whole, therefore, we find no duty cast upon the company to make this railway in any part of this act of parliament. On the contrary, the legislature seems to contemplate the possibility of the railway being made in part, or being totally abandoned. In the latter case the powers expire in three or five years; in the former, the statute remains in force as to so much of the railway as shall have been completed within that time, and expires as to the residue. This provision is inconsistent with the in-

corporations, as affected by the writ of mandamus. But it may be useful to state that this is the appropriate remedy, where any

tention to compel the company to make the entire line, as the consideration for the powers granted by the act.

"But it is said that a railway act is a contract on the part of the company to make the line, and that the public is a party to that contract, and will be aggrieved if the contract may be repudiated by the company at any time before it is acted upon. Though commonly so spoken of, railway acts, in our opinion, are not contracts, and cannot be construed as such. They are what they purport to be, and no more. They give conditional powers, which, if acted upon, carry with them duties, but which, if not acted upon, are not, either in their nature or by express words, imperative on the companies to which they are granted. Courts of justice ought not to depart from the plain meaning of the words used in acts of parliament. When they do, they make but do not construe the laws. If it had been so intended, the statute should have required the companies to make the line in express terms; indeed, some railway acts are framed upon this principle; and to say that there is no difference between words of requirement and words of authority when found in such acts, is simply to affirm that the legislature does not know the meaning of the commonest expressions. But if we were at liberty to speculate upon the intentions of the legislature when the words are clear, and to construe an act of parliament by our own notions of what ought to have been enacted upon the subject, — if, sitting in a court of justice, we could make laws, much might be said in favor of the course which, in our opinion, is taken by the legislature on such subjects. Assuming that the line, if made, would be profitable to the public, that benefit may be delayed for five years, during which time competition is suspended. On the other hand, if the line would pay, it probably will be proceeded with, unless the company having the power is incompetent to the task. Individual land-owners may be benefited by the expenditure of capital in their neighborhood, without looking to the ultimate result; but it is not for the public interest that the work should be undertaken by an incompetent company, nor that it should be begun, if, when made, it would not be remunerative. By leaving the exercise of the powers to the option of the company, the legislature adopts the safest check on abuse in either of those respects, namely, self-interest. It seems to us, therefore, that these statutes do not cast upon the plaintiffs in error the duty, either by express words or by implication, that we ought to adhere to the plain meaning of the words used by the legislature, which are permissive only, and there is no reason, in policy or otherwise, why we should endeavor to pervert them from their natural meaning.

"But it is said that the land-owners are in a better situation than the public at large, and that the privilege to take their own lands is the consideration which binds the company to complete the railway. That during the currency of the three years they are deprived of their full rights of ownership, and, if not to be compensated by the construction of the railway, they would in many cases suffer a loss, because, whilst the compulsory power of purchase subsists, they are pre-

member or officer of a corporation is unlawfully deprived of his proper agency or function in the affairs of the company through

vented from alienating their lands or houses described in the books of reference, and from applying them to any purposes inconsistent with the claim that may be made to them by the railway company. In truth, they are not prevented from so doing at any time before the notice to take their land is given, if they act *bonâ fide* in the mean time; the notice to take their lands being the inception of the contract between the land-owners and the company. But if this complaint was better founded, it does not follow, because certain land-owners are subjected to temporary inconvenience for the performance of a public good, that therefore the company are bound to make the whole railway. If it were a contract between the land-owners and the company, it would not be just, the one should be bound and the other free. But to assert that there is a contract between the land-owners and the company, is to beg the whole question; for on this part of the case the question is, whether there is such a contract? As a matter of fact, we know that in many cases no such actual contract exists. Some few proprietors may desire and promote the railway, but many others oppose it, either from disinclination to the project or with a view to make better terms. With the dissentients there is no contract, unless it be found in the statute, and to the statute therefore we must look to see what is the obligation that is cast upon the company in respect of the land-owners upon the line. As in the former case, the words upon this subject are permissive only. The company may take land; if they do they must make full compensation. And in that state of things, if there be a bargain between the parties, what is the bargain? The company say, in the language of the statute, that the bargain is that they shall make full compensation for the land taken, and no more; the prosecutors say, that the consideration to be paid for the land is the full compensation mentioned in the act, and also the further consideration of the construction of the entire line of railway from York to Beverley. But if this is the price which the prosecutors are to have, each land-owner is entitled to the same value, and yet by this mandamus the other proprietors on the line from Market Weighton to Cherry Burton, who perhaps are hostile to the application, are constrained to sell their lands for an inadequate consideration, namely, the full compensation and a part only of the line of railway, to which, by the hypothesis, they were entitled by the original bargain. If this were the true meaning of the statute, it would indeed be unjust, more so than the imposition of the temporary inconvenience to which it is said the land-owners may be subject, and to which we have already referred. But that that is not the true meaning, is clear from the words of the statute, which are permissive, and only impose the duty of making full compensation to each land-owner, as the option of taking the land of each is exercised; and further, from the section to which we have already referred, which contemplates the total abandonment of the line, or a part performance of it, and makes provision for the return of the land to the original proprietors in certain cases. Upon this part of the case the authority of Lord *Eldon*, in Blakemore *v.* The Glamorganshire Canal Company, 1 Myl. & K. 154, was much pressed upon the court. Speaking of contracts for

its agency. This is somewhat questioned by some of the earlier English cases.[1]

private undertakings he says: 'When I look upon these acts of Parliament I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them, and I have no hesitation in asserting that, unless that principle be applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such acts of Parliament have now become extremely numerous, and from their number and operation they so much affect individuals, that I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and forbear all that they are hereby required to do and forbear, as well with reference to the interest of the public as with regard to the interest of individuals.' There is nothing in that language to which it is necessary to make the least exception; indeed it is nothing more than an illustration of the obligatory nature of the duty imposed by acts of Parliament, which do impose a duty with reference to other persons. In that case the statute had secured to Mr. Blakemore the surplus water, and had commanded the company to do certain things that he might enjoy it. In discussing whether Mr. Blakemore's right under the statute was affected by his right before the statute, his lordship might well say he considered the statute the origin of Mr. Blakemore's right in the light of a contract, and the statute then under discussion containing express words of command, he might well add, that those who come for such acts of Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do. As we understand them, the words used by Lord *Eldon* in no respect conflict with the view we take of this case; but if they mean that words of permission only, when used in the class of cases under consideration, should receive a construction different from their ordinary meaning, because, if construed otherwise, they might work injustice, with great respect for his high authority, we dissent from that proposition. We agree with my brother *Alderson*, who, in Lee *v.* Milner, 2 Y. & Coll. 611, said: 'These acts of Parliament have been called parliamentary bargains, made with each of the land-owners. Perhaps more correctly they ought to be treated as conditional powers given by Parliament to take the lands of the different proprietors through whose estates the works are to proceed. Each land-owner, therefore, has the right to have the power strictly and literally carried into effect as regards his own land, and has the right also to require that no variations shall be made to his prejudice in the carrying into effect a bargain between the undertakers and any one else.' 'This,' he adds, 'I conceive to be the real view taken of the law by Lord *Eldon*, in the case of Blakemore *v.* The Glamorganshire Canal Company.' There remains but one further view of the case to be considered, and

[1] Vaughn *v.* Company of Gunmakers, 6 Mod. 82; S. P. Comb. 45; White's case, 6 Mod. 18.

2. But a different rule, as to requiring the office to be of a public nature to justify the writ of mandamus to restore the

that we have partly disposed of in the observations we have already made; but inasmuch as Lord *Campbell* proceeded on this ground only in the court below, although it was not much relied upon before us in the argument, we have, out of respect for his high authority, most carefully examined it, and are of opinion that the mandamus cannot be supported, on the ground that the railway company, having exercised some of their powers and made a part of their line, are bound to make the whole railway authorized by their statutes.

"It is unnecessary here to determine the abstract proposition, that a work which, before it is begun, is permissive, is, after it is begun, obligatory. We desire not to be understood as assenting to the proposition of my brother *Erle*, that many cases may occur where the exercise of some compulsory powers may create a duty to be enforced by mandamus; and, on the other hand, we do not say that such may not be the law. If a company, empowered by act of parliament to build a bridge over the Thames, were to build one arch only, it would be well deserving consideration whether they could not be indicted for a nuisance in obstructing the river, or for the non-performance of duty in not completing the bridge. It is sufficient to say that in this case there are no circumstances to raise such a duty, if such a duty can be created by the acts of plaintiff himself. The plaintiffs in error have made the principal portion of their line, and they have abandoned the residue for no corrupt motive, but because Beverley has already sufficient railway communication, and because the residue of the line passes through a country thinly populated, and if made would not be remunerative. But it is said that the railway company are not in the situation of purchasers of land, with liberty to convert it to any purpose, or to allow it to be waste; that they are allowed to purchase it only for a railway, and having acquired it under the compulsory power of the act, there must be an obligation upon the company to apply the land to that, and to no other purpose. Subject to the qualification in the act, this is undoubtedly true. Having acquired the lands of particular land-owners, the company could not retain them by merely laying rails on the lands so taken, and we agree it never was intended that the land-owners should be left with a high mound or a deep cutting running through their estate, and leading neither to nor from any available terminus. The precaution against such a wasteful expenditure of capital may, perhaps, safely be left to the self-interest of the company, but if such work were to be done, it would not be a practicable railway, and after five years the powers of the act would expire, and the land revest in the original proprietor. It is true that he would sustain some inconvenience without the corresponding advantage of railway communication, but in the mean time he would have received full compensation in the market value of the land, and for all damage by severance or otherwise, and would receive back the land on more reasonable terms. To be a railway it must have available *termini*. When the statutes passed, all persons supposed the *termini* would be York and Beverley; and if the argument be well founded, and the company are bound, if they take the land upon any portion of

party to it, seems to have obtained since the case of Rex *v.* Baker,[2] and the only proper inquiry now is whether the plaintiff has any such valuable and permanent interest in the office or place as to justify the granting of the writ.[3]

the railway, to complete the whole line, it would seem to follow that one of the proprietary, by compelling the company to take his land on the line from Market Weighton to Cherry Burton, would thus entitle himself to a mandamus to compel them to make the line from Cherry Burton to Beverley, and the acts having expired, to apply to Parliament for a renewal of their powers for that purpose. But although the *termini* were originally intended to be York and Beverley, it is plain that the legislature contemplated the possibility of the line being abandoned or being only partially made, because in the one case the powers of the act were to cease, and in the other they were partially continued. An option, therefore, is given to some one. By the course taken the Court of Queen's Bench has exercised that option, and said the line is to be made, not to Beverley, but to Cherry Burton. In our opinion that option is left to the company, and the company having *bonâ fide* made an available railway over the land taken, the obligation to the land-owner has, in that respect, been fulfilled. The cases upon this subject are very few, and the absence of authority is very striking, when we remember how many acts have passed *in pari materia*, not only for railways, but also for bridges and turnpike roads. Notwithstanding the numerous occasions on which such proceedings might have been taken, and the manifest interest of land-owners to enforce their rights, no instance can be found of an indictment for disobeying such a statute, or of a mandamus for the purpose of enforcing it. If correctly reported, Lord *Mansfield* determined this point in The King *v.* The Proprietors of the Birmingham Canal, 2 Wm. B. 708, for he says the act imports only an authority to the proprietors, not a command. They may desert or suspend the whole work, and, *à fortiori*, any part of it. On the other side, the language of Lord *Eldon*, in Blakemore *v.* The Glamorganshire Canal Company, is referred to as an authority for this mandamus. In our opinion it does not bear that construction, although it appears that the Court of Queen's Bench took a different view of that authority in the case of The Queen *v.* The Eastern Counties Railw. Company, 10 Ad. & Ell. 531, and was inclined to act upon it, and award a mandamus. The writ was subsequently withheld in that case on another ground, but Lord *Denman* seems to have been of opinion that on a fit occasion a mandamus ought to go. That, and the recent cases in the Queen's Bench, now under discussion, are the only cases which bear upon the subject. We feel that Lord *Denman* and Lord *Campbell* are high authorities upon this or any other matter, and are both equally entitled to the respect of this court; but we are bound to pronounce our own judgment, and, after the most careful consideration, are of opinion that the judgment ought to be for the plaintiffs in error. The result is, that the judgment of the Court below must be reversed."

[2] 3 Burrows, 1267.

[3] Angell & Ames, §§ 704, 705.

3. It was held, in an early case[4] in Massachusetts, that this remedy could not be rendered available in cases where the office only extended to one year, and the question arising upon the return to the writ was one of fact, the traverse to which could not, according to the course of practice in that court, be determined before the term of the office would expire. "The cases, therefore," say the court, "in which the writ of mandamus may be an adequate remedy, in admitting or restoring to office, seem to be where the office is holden for a longer term than a year, or where the return to the writ will involve merely a question of law, so that, admitting the facts to be true, a peremptory mandamus ought to go."

4. It was accordingly held, in a very late English case,[5] that, as mandamus to reinstate a person in office only lies where the office and its tenure are of a permanent nature, it is not an available remedy for the secretary of a benefit society, who had been dismissed by a resolution of a meeting of the society. The court here seem to consider that the office must be of such a character that the incumbent has such a vested and permanent interest in the same as that the court could render the operation of the writ of mandamus effective towards restitution, and where its operation is not liable to be countervailed by any counter agency.

*SECTION III.

Mandamus to compel Company to complete their Road.

1. *English courts have required this upon a general grant.*
2. *But these cases overruled. Not required now, unless under peculiar circumstances.*
3. *Recent case in New York court of appeals.*

§ 192. 1. The English courts at one time, it would seem, regarded a parliamentary grant to a railway company as equivalent * to an agreement on their part to build the road. To make this intelligible to the American reader it is necessary to keep in mind * the English parliamentary rules, in regard to passing acts

[4] Howard *v.* Gage, 6 Mass. R. 462, 464.

[5] Evans *v.* The Heart of Oak Benefit Society, 11 Jur. N. S. 163.

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of incorporation of such companies. The promoters are required to prepare * plans and sections, and maps of their roads, with the line delineated thereon, so as to show its general course and direction, * and to deposit copies of the same with the clerks of the peace, in the office of the Board of Trade, the Private Bill Office, in certain * cases at the Board of Admiralty, and with the parish clerk of each parish through which the proposed line passes, before parliament * assembles, and the plans are usually referred to in the charter as defining the course of such railway, and thus become binding upon the company, although not so regarded unless so referred to.[1] Specific notice too is to be served upon each land proprietor whose land is to be taken.[1] There is therefore some plausibility in regarding the obtaining of a charter under these circumstances as a binding obligation on the part of the company that they will build the road. No act of incorporation of a railway is passed in the British parliament until three fourths of the estimated outlay is subscribed. Accordingly, in some of the earlier cases upon this subject, after considerable discussion and examination, it is laid down,[2] that when a railway company have obtained an act of parliament, reciting that the proposed railway will be beneficial to the public, and that the company are willing to execute it, and giving them compulsory powers upon landholders for that purpose, and in pursuance of such powers the company have taken land, and made part of their line, they are bound by law to complete such line, not only to the extent which they have taken lands, but to the furthest point. And this is so * held in some cases, although the statute enacts only that it shall be lawful for them to make the railway.

[1] Hodges on Railways, 18, and notes; North British Railw. Company *v.* Tod, 4 Railw. Cas. 449; Reg. *v.* The Caledonian Railw. Co., 3 Eng. L. & Eq. 285.

[2] The Queen *v.* The York & North Midland Railw. Co., 16 Eng. L. & Eq. 299. This case was decided by a divided court, *Erle*, J., dissenting, whose opinion ultimately prevailed in the Exchequer Chamber. Lord *Campbell*, Ch. J., and the majority of the court, founded their opinion chiefly upon the celebrated judgment of Lord *Eldon*, in Blakemore *v.* The Glamorganshire Canal Navigation, 1 Mylne & Keen, 154. See also Reg. *v.* Ambergate, &c. Railw. Co., 23 Law Times, 246; Reg. *v.* Eastern Counties Railw., 1 Railw. C. 509. But the writ was held defective in this case, in not alleging that the company had abandoned or unreasonably delayed the work. Reg. *v.* Same, 2 Railw. C. 260.

2. So also in another case,[3] where the undertaking was not yet entered upon, it was held that the company under such circumstances were bound to execute the work, from the time when such act receives the royal assent. And in another case,[4] where by the return to the writ it appeared that the company had no sufficient funds to build the road, and that the period for exercising their compulsory powers in obtaining lands had expired, and that the building of the road had thus become impossible, it was held that a mandamus must nevertheless be awarded. Writs of peremptory mandamus issued in each of the foregoing cases. But the first and last of these three cases came before the Exchequer Chamber, and were heard at great length before all the judges, and an elaborate opinion delivered by *Jervis*, Ch. J., of the C. B., reversing the judgment of the Q. B., chiefly on the ground that there was no implied obligation upon the company, either before or after entering upon the work, to complete it.[5]

3. This question arose and was examined in the courts of New York, somewhat, in a late case,[6] where it was held that a railway corporation, which has completed its road between the termini named in the charter, forfeits its franchise by abandon-

[3] Reg. *v.* The Lancashire and Yorkshire Railw. Co., 16 Eng. L. & Eq. 327.

[4] Reg. *v.* Great Western Railw. Co., 16 Eng. Law & Eq. 341. The extreme to which this very questionable doctrine was pushed in this case, seems to have proved, as is not uncommon in such cases, the point of departure, for its entire overthrow and abandonment.

[5] York & North Midland Railw. Co. *v.* Reg., 18 Eng. L. & Eq. 199; Great Western Railw. Co. *v.* Same, Id. 211. These decisions, rendered (in April 1853), one of which is given at length in the last section, seem to have been acquiesced in, and they certainly conform to what has ever been regarded as the law upon that subject in this country. And the same principle was maintained in Scottish Northeastern Railw. *v.* Stewart, 3 McQueen's H. L. Cases, 382; s. c. 5 Jur. N. S. 607. But see Lind *v.* Isle of Wight Ferry Co., 7 Law Times, N. S. 416; Mason *v.* Stokes Bay Pier & Railw. Co., 11 W. R. 80. It is here held, that where a notice from a railway company to take lands for the purposes of their undertaking has been followed by an award fixing the amount of purchase and compensation-money, the court has jurisdiction to compel the company to complete the purchase. S. P. Metropolitan Railw. *v.* Woodhouse, 11 Jur. N. S. 296; s. c. 34 L. J., Ch. 297. But see Quicke *ex parte*, 13 W. R. 924; s. c. 12 L. T. N. S. 113.

[6] The People *v.* The Albany & Vermont Railw., 24 N. Y. Court of Appeals, 261; s. c. 37 Barb. 216.

ing or ceasing to operate a part of the route. The remedy, however, in such cases, is not by injunction at the suit of the public, but by mandamus or indictment at the election of the state, or by proceeding to annul the corporation.

It is here said, that it seems that the corporation owes a duty to the public to exercise the franchise granted to it, and that it cannot abandon a portion of its road and incur a forfeiture at its mere pleasure.

*SECTION IV.

In what Cases this is the proper Remedy.

1. *Where the act is imperative upon the company to build road.*
2. *Mandamus more proper remedy than injunction.*
3. *Commissioners of public works not liable to this writ.*
4. *Public duties of corporations may be so enforced.*
5. *Facts tried by jury. Instances of this remedy.*
6. *Cannot be substituted for* certiorari, *when that is taken away.*
7. *Requiring costs to be allowed.*
8. *Other instances of its application.*
9. *Lies where the duty is clear, and no other remedy.*
10. *Not awarded to control legal discretion.*
11. *Does not lie to try the legality of an election.*
12. *Lies to compel transfer of stock.*

§ 193. 1. But although it must be regarded as now definitively settled that the writ will not lie, in any case, coming within the *categories laid down in the foregoing opinion of *Jervis*, Ch. J., yet where the act of the legislature is imperative upon the company to build their road, this duty will still be enforced by mandamus.[1]

[1] Hodges on Railways, 665, in note; Great Western Railw. Company *v.* Reg. Excheq. Ch. 1853. 18 Eng. Law & Eq. 211. The land-owners are so far interested in the building of a railway as to be entitled to bring the petition, and different owners of land may join. Reg. *v.* York and North Midland Railw., 16 Eng. L. & Eq. 299. But it has been held, that a land-owner could not apply for an injunction to restrain a railway company from applying for an act of the legislature repealing a former act, and to restrain them from paying back deposits. Hodges on Railways, 657, *note;* Anstruther *v.* East Fife Railw., 1 McQueen, 98. Nor can a land-owner maintain a suit in equity against a company for not completing their line, in pursuance of their act of incorporation. Heathcote *v.* North Staffordshire Railw. Company, 6 Railw. C. 358. The Lord Chancellor here held, reversing the opinion of the Vice-Chancellor, that in such

2. But it has been held that such public duty cannot be enforced by injunction, at the suit of the attorney-general.[2] Corporations have for a very long time been compelled, by writ of mandamus, to perform duties imposed by statute.[3] A turnpike company was compelled to fence its road where it passed through the land of private persons, and it was held no excuse that the company had made satisfaction for the damages awarded to the land-owner, or that, having completed their road, they had no funds with which to build the fences.[4]

3. But it has been held, that Commissioners of Woods and Forests, who gave notice that they intended to take certain lands, in order to ascertain if they could be obtained at a certain price, and finding, by the claim of the land-owners, that the land could not be obtained, so as to bring the amount to be expended within the legislative limit, and the funds at the disposal of the

case, a court of equity will leave the party to his legal rights. Reg. *v.* Dundalk & Enniskillen Railw., 5 L. T. N. S. 25; Lind *v.* Isle of Wight Ferry Co., 7 L. T. N. S. 416; State *v.* Hartford & New Haven Railw., 29 Conn. R. 538. And mandamus is the proper remedy by which to compel a canal company to bridge over a private way which it intersects. Habersham *v.* Savannah &c. Canal Co., 26 Georgia R. 665.

[2] Attorney-General *v.* Birmingham & Oxford Junction Railw., and two other Companies, 7 Eng. L. & Eq. 283.

[3] The Hartford & New Haven Railway Company was chartered to construct and operate a railroad from Hartford to the navigable waters of the habor of New Haven. A steamboat company was afterwards chartered to run in connection with it to New York; and the railroad and steamboat line constituted a route that was of great convenience to the public. After the construction of the road and the use of it in connection with the steamboat line for several years, the railroad company constructed a track diverging from its original track at a point a mile and a half from tide-water and running to the station of the New York & New Haven railway company, in the city of New Haven, and discontinued the running of its passenger trains to its original terminus at tide-water. This change incommoded travellers who wished to pass by the steamboat route, of whom there were many. Held, that a mandamus ought to be issued to compel the company to run passenger trains to its original terminus, and that the mandamus was properly applied for by the attorney for the state. State *v.* Hartford & New Haven Railw., 29 Conn. R. 538.

[4] Reg. *v.* Trustees Luton Roads, 1 Q. B. 860. Lord *Denman*, Ch. J., said, "The law orders these parties to perform the duty if they build the road." *Patteson*, J., said, "If they had not adequate funds they ought not to have made the road."

commissioners, abandoned their notice, could not be compelled by mandamus to take the land, such commissioners acting in a public capacity, although the rule is otherwise as to private railway companies.[5]

*4. Public duties of corporations have been enforced by mandamus, as repairing the channel and banks of a river, which, by their charter, they had been permitted to alter.[6] Also to make alterations in the sewers of a city; and where, in the act of parliament, this duty is defined, "to make such alterations and amendments in the sewers as may be necessary in consequence of the floating of the harbor," it was held this was a proper form for the command of the writ.[7] Also to restore a highway, intersected by a railway, to its former width.[8]

5. In the English practice, questions of fact, arising on a man-

[5] Reg. *v.* Commissioners of Woods and Forests, 15 Q. B. 761; *Ante*, § 88.

[6] Reg. *v.* Bristol Dock Company, 1 Railw. C. 548, 2 Q. B. 64, 2 Railw. C. 599. A return that the law imposed no such duty, but that they had performed it, "as near as circumstances permitted," is insufficient, as being a traverse of the law, or an evasion of the writ. Reg. *v.* Caledonian Railw., 3 Eng. L. & Eq. 285.

[7] The King *v.* The Bristol Dock Company, 6 Barn. & Cress. 181. Mandamus is the appropriate remedy to compel a delinquent municipal corporation to discharge its liabilities under a subscription to stock of, or a loan of its credit to, a railroad company. Commonwealth *v.* Perkins, 43 Penn. St. 400. A declaration for a mandamus to levy a rate to pay a debt is good, though it does not state the amount of the debt. Ward *v.* Lowndes, 6 Jur. N. S. 247; s. c. 29 L. J., Q. B. 40; Ellis & Ellis, 940. But see McCoy *v.* Harnett County, 5 Jones Law, 265. But in Austin, *ex parte*, 13 Law Times, N. S. 443, it was held that the court will not in the first instance grant a rule for a mandamus calling on a public order to make a rate for the payment of costs due to a successful appeal against a rate which had been quashed at quarter sessions. After the order for payment of costs is found good, if it is still disobeyed, a mandamus may be called for. Austin *ex parte*, *supra*. See People *v.* Mead, 24 N. Y. R. 114.

Mandamus will lie to compel a town committee to pay their damages to landowners for lands taken for a highway. Minhinnah *v.* Haines, 5 Dutch, 388; State *v.* Keokuk, 9 Iowa R. 438. And see State *v.* County Judge, 12 Iowa R. 237; State *v.* Davenport, Id. 335; Knox County *v.* Aspinwall, 24 How. (U. S.) 376; Uniontown *v.* Commonwealth, 34 Penn. St. 293; Commonwealth *v.* Pittsburg, Id. 496.

[8] Reg. *v.* Birmingham & Gloucester Railw., 2 Railw. C. 694; 2 Q. B. 47; Reg. *v.* Manchester & L. Railw., 1 Railw. C. 523; 3 Q. B. 528; 2 Railw. C. 711. But in some cases it is requisite the duty should be strictly defined. Reg. *v.* The Eastern Counties Railw., 3 Railw. C. 22; 2 Q. B. 569.

damus, are tried by a jury.[9] So a railway company may, by mandamus, be required to establish an uniform rate of tolls.[10] And also to proceed in the appraisal of land damages, after giving notice to treat.[11] So the sheriff, or officer who holds the inquisition, may be compelled to proceed where he has no legal excuse, as where such officer assumed to direct a verdict against the claim, on the ground the applicant could not recover.[12]

* 6. But where the statute in terms takes away the remedy by *certiorari*, the court will not indirectly accomplish the same thing by mandamus.[13]

7. A mandamus was awarded requiring the presiding officer to allow costs in a case before him,[14] for assessing land damages, including witnesses, attendance by attorney at the inquest, conferences and briefs, but not the expenses of surveyors, as such.

[9] Reg. *v.* London & Birmingham Railw., 1 Railw. C. 317; Reg. *v.* Manch. & Leeds Railw., 2 Railw. C. 711; Reg. *v.* Newcastle-upon-Tyne, 1 East, 114.

[10] Clarke *v.* L. & N. Union Canal, 6 Q. B. 898. But in this case judgment was given for defendant, by reason of the "insufficiency of the writ."

[11] *Ante*, § 88, 99, *et seq.* and cases there cited.

[12] Walker *v.* The London & Blackwall Railw., 3 Q. B. 744. In Carpenter *v.* Bristol, 21 Pick. 258, which was where county commissioners refused to assess damages sustained in consequence of constructing a railway, on the ground that the party applying did not own the land, and also refused to grant a warrant for a jury to revise their judgment, as required by R. S. ch. 39, § 56: Held, that the party was entitled to a jury to revise, and that a mandamus would lie to compel the commissioners to grant a warrant.

The court say, "Where application was made to county commissioners to estimate damages caused by the laying out of a railroad, turnpike, or highway, the duty required of them would be a judicial duty. If they refused or neglected to perform it, this court would issue a mandamus commanding them to do it, that is, to exercise their judgment on the matter. But when they had performed this duty, it being within their discretion, no other tribunal would have a right to interfere with or complain of the manner in which they had performed it." So also in Chicago, Burlington, & Quincy Railw. *v.* Wilson, 17 Ill. R. 123, it was held, that upon application to a judge, to appoint commissioners to condemn land for the use of a railway, he is compellable to act, if a case is made under the statute. His duty is ministerial, and not judicial, and a mandamus was accordingly awarded.

[13] The King *v.* The Justices of West Riding of Yorkshire, 1 Ad. & Ell. 563.

[14] The King *v.* The Justices of the City of York, 1 Ad. & Ell. 828; Reg. *v.* Sheriff of Warwickshire, 2 Railw. C. 661.

8. And where the commissioners refused to assess the value of land taken for a railway, on the ground that the prosecutor had no title to the same, it was held that he is entitled to have their judgment revised by a jury, and a mandamus will lie, on his behalf, to compel the commissioners to grant a warrant for a jury.[15] And a mandamus will issue, at the suit of supervisors of a town, to compel a railway to build a highway,[16] or bridge,[17] for public use.

9. No better general rule can be laid down upon this subject, than that where the charter of a corporation, or the general statute in force, and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no other specific or adequate remedy, the writ of mandamus will be awarded. But if the charter, or the general law of the state, affords any other specific and adequate remedy, it must be pursued.[18]

10. So, too, it must be a complete and perfect legal right, or the * court will not award the writ.[19] And the writ of mandamus is never awarded to compel the officers, or visitors of a corporation,

[15] Carpenter *v.* Bristol, 21 Pick. 258. See Smith *v.* Boston, 1 Gray, 72.

[16] Whitmarsh Township *v.* Phil. Ger., & N. Railw. Co., 8 Watts & Serg. 365.

[17] Cambridge & Somerville *v.* Charlestown Branch Railw., 7 Met. 70.

[18] Rex *v.* Nottingham Old Waterworks, 6 Ad. & El. 355; Dundalk Western Railw. *v.* Tapster, 1 Q. B. 667; Corregal *v.* London & Blackwall Railw., 3 Railw. C. 411; The People *v.* The Corporation of New York, 3 Johns. Cas. 79. It seems to be considered, that *quo warranto* will not lie to an eleemosynary corporation, and therefore mandamus is the necessary remedy to correct abuses. 2 Kyd on Corporations, 337, n. a. In King *v.* Dr. Gower, 3 Salk. 230, it was held mandamus was not the proper remedy to try the right. Rex *v.* Bank of England, Douglas, 524; Shipley *v.* Mechanics' Bank, 10 Johns. 484; The State *v.* Holiday, 3 Halst. 205; Asylum *v.* Phenix Bank, 4 Conn. R. 172. Unless the rights of the stockholders in this respect are restricted by the charter of the corporation, or by its rules and by-laws passed in conformity thereto, stockholders have a right of access at reasonable hours to the proper sources of information, to know how the affairs of the corporation are conducted; and if such access is refused to them, mandamus is the appropriate remedy to enforce this right. Cockburn *v.* Union Bank, 13 La. Ann. 289. See also People *v.* Haws, 34 Barb. 69; Lamb *v.* Lynd, 44 Penn. St. 336. But see Briggs, *ex parte*, 28 L. J., Q. B. 272, where the assertion of the right to inspect accounts is somewhat modified.

[19] Rex *v.* Archbishop of Canterbury, 8 East, 213; People *v.* Collins, 19 Wend. 56; 1 Wend. 318; Napier, *ex parte*, 12 Eng. L. & Eq. 451.

who have discretionary powers, to exercise such powers according to the requisitions of the writ, but to compel them to proceed and exercise them according to their own judgment, in cases where they refuse to do so.[20] And it may be laid down as a general rule, that where any officers, or boards, have a legitimate discretion, and are acting within their appropriate jurisdiction, they cannot be controlled in their action by mandamus, issuing from a superior court.[21] If the visitor or trustee be himself the party interested in the exercise of the function, it is said to form an exception.[22]

[20] Rex *v.* Bishop of Ely, 1 Wm. Black. 81; Reg. *v.* Dean and Chapter of Chester, 15 Q. B. 513; Appleford's case, 1 Mod. 82. Lord *Hale's* opinion cited with approbation by Lord *Campbell*, Ch. J., 15 Q. B. 520; Rex *v.* Bishop of Ely, 2 T. R. 290; Murdock's Appeal, 7 Pick. 322; *Parker*, Ch. J., Attala County *v.* Grant, 9 Sm. & Mar. 77; Towle *v.* The State, 3 Florida R. 202; 2 Q. B. 433; *Ex parte* Benson, 7 Cow. 363, and cases cited, 3 Binney, 273; 5 Id. 87; 6 Id. 456; 5 Id. 536; 2 Penn. R. 517; 5 Wend. 114; 10 Pick. 244; 13 Pick. 225; 24 Id. 343; People *v.* Columbia C. P., 1 Wend. 297.

But the officers of a municipal corporation will be compelled to hold a court for the revision of the list of burgesses, notwithstanding the time for holding the same, in compliance with the terms of the statute, had elapsed, and notwithstanding the mayor, at the time of granting the mandamus, was not the same person who acted at the court. Regina *v.* Mayor and Assessors of Rochester, 30 Law Times, 73.

But it was held, in Heffner *v.* Commonwealth, 28 Penn. St. 108, that the plaintiff in the proceeding must show a specific legal right, which had been infringed; and that the damage, which the petitioner suffered, in common with other citizens, by the neglect of a municipal corporation to lay out an alley, although, by reason of his land lying adjacent, he was specially exposed to suffer loss by the neglect, would not entitle him to demand the writ: that the injury sustained by the petitioner must not only be different in amount or degree, but must be different in kind from that which falls upon the public in general, by the grievance complained of, to entitle him to the writ. The suit should be prosecuted by some public officer, for the redress of an omission of duty affecting only the public interest and that of individuals incidentally.

So, also, where the party is entitled to costs in a proceeding before commissioners to estimate land damages against a railway, unless the duty to award such costs is one which is plain and obvious, it will not be enforced by writ of mandamus. Morse, Petitioner, 18 Pick. 448. And the court will not grant a mandamus requiring parish officers to receive a pauper in obedience to an order of removal, the proper course being by indictment. Downton, *ex parte*, 2 El. & Bl. 856.

[21] Waterbury *v.* Hart., Prov., & F. Railw. Co., 27 Conn. R. 146.

[22] Reg. *v.* Dean and Chapter of Rochester, 6 Eng. L. & Eq. 269.

11. But in a recent case,[23] it is said to be an inflexible rule of law, that where a person has been *de facto* elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a *quo warranto* information. A mandamus will not lie, unless the election can be shown to be merely colorable.

But where the right is clear, or where the old board refuse to surrender to the newly elected one, without any color of excuse, the new board may be put in possession of the insignia or functions of office by writ of mandamus, or, as held in some of the states, by bill in equity.[24]

12. And this is the proper remedy to compel a corporation to allow the transfer of stock upon their books,[25] or the company may be compelled to pay damages for such refusal by an action at law.[25]

SECTION V.

Proper Excuses, or Returns to the Writ.

1. *Company may return that powers had expired at date of writ.*
2. *May show want of funds to perform duty.*
3. *But cannot show that road is not necessary, or would not be remunerative.*
4. *May quash part of return, and require answer to remainder.*
5. *Counsel for writ entitled to begin and close.*
6. *Cannot impeach the statute in reply to the writ.*
7. *Peremptory writ cannot issue till whole case tried.*
8. *Will not quash return summarily.*
9. *No excuse allowed for not complying with peremptory writ.*

§ 194. 1. It seems to be an unquestionable answer to the writ * of mandamus to compel the company to complete their road, that the time for taking lands under the act had expired at the time of issuing the alternative writ, so that it had become impos-

[23] Reg. *v.* Mayor, &c. of Chester, 34 Eng. L. & Eq. 59.

[24] Dart *v.* Houston, 22 Ga. R. 506.

[25] Helm *v.* Swiggett, 12 Ind. R. 194. But where a shareholder executed a transfer of his shares, which he took together with the certificate of his shares to the company's office for registration, and left the transfer, but refused to leave the certificate for the inspection of the directors, it was held that the court would not compel the company to register the transfer. East Wheal Martha Mining Company *in re*, 33 Beav. 119.

sible to build the road, as required in the writ.[1] But where, at the time of the service of the alternative mandamus, the company had time to institute compulsory proceedings for taking lands, it was held, that if, instead of doing so, they attempted to defend the writ, and failed, it was at their peril, and the court would not excuse them, upon the ground that in the mean time their compulsory powers had expired.[2]

2. And where it was attempted to defend against the writ, on the ground that it was not shown that the company had funds, the court said, in the last case referred to: "We shall presume that the company have funds." But it would seem that the want of funds, and of the ability to obtain them, if shown on the return to the alternative mandamus, might be an excuse.[3]

[1] Reg. *v.* London & N. W. Railw., 6 Eng. L. & Eq. 220, denying the authority of Reg. *v.* Birmingham & Gloucester Railw., 2 Q. B. 47, upon this point, as justifying the writ. And in the former case it was held, the prosecutors were guilty of laches in not sooner applying for the writ. But a plea that the cause of action did not accrue within six years, is a bad plea to a declaration for a mandamus, as the statute of limitations does not bar an action for such a writ. Ward *v.* Lowndes, 6 Jur. N. S. 247; s. c. 29 L. J. Q. B. 40.

[2] Reg. *v.* York, Newcastle, & Berwick Railw., 6 Eng. L. & Eq. 259; Reg. *v.* Lancashire & Yorkshire Railw., 6 Eng. Law & Eq. 265; Reg. *v.* G. W. Railw., 18 Eng. L. & Eq. 364. In this case it was held, that the return must show that the company's compulsory powers for taking land had expired, and that they could not obtain the necessary land without exercising those powers. Where, on motion for mandamus to compel the company to build a bridge, it was stated on behalf of the company that they could not build it without purchasing additional land, and that their powers for that purpose had expired, and the prosecutor stated that they could build it without taking additional land, it was held that a writ of mandamus should issue to the company, and that they might return their inability from want of power to purchase land. Regina *v.* Dundalk & Enniskillen Railw., 5 L. T. N. S. 25. Where mandamus was issued to a railway, reciting that premises in the occupation of B. had been injuriously affected by the works of the company, and that the company having declined to join in the appointment of an arbitrator to estimate the damage to B., he had appointed an arbitrator, who had duly made his award, and commanding the company to take up his award, and the company returned that B. also occupied other lands that were taken by the company, and that, before the execution of their works, it was agreed between him and the company that the company should pay to him a certain sum in satisfaction of the lands so taken, and the premises so injuriously affected, this was held a good return. Regina *v.* West Midland Railw., 11 W. R. 857, in the Queen's Bench.

[3] Lord *Campbell*, Ch. J., in Reg. *v.* London & N. W. Railw., 6 Eng. L. &

And the company are not estopped from making this plea by reason of having, in some instances, exercised their compulsory powers of taking land.[4]

3. But it is no sufficient excuse that the road has become unnecessary, or that it would not prove remunerative, or that, in all reasonable probability, the funds which will come to the hands of the company will prove inadequate to the completion of the work.[5]

4. By the English statute the court may quash part of a return to the writ which is bad in law, and put the prosecutor to plead to * or traverse the remainder. But if the grounds of defence to the writ be repugnant, the court may, upon that ground, quash the whole.[6]

5. The counsel for the crown are allowed to begin, although the return may be in the nature of a demurrer to the writ.[7] The validity of the writ may be impeached on the return.[8]

6. In a case where the approaches to a bridge across a railway were not of the width required by the special act, a return to the writ of mandamus, that they were as convenient to the public as the original road, or as they could be made, in execution of the powers of the act, and that to widen them to the dimensions defined in the act would require more land, and that their powers for taking land compulsorily had expired before they were called upon to widen these approaches, is bad.[9]

7. The peremptory writ will not be issued until all the mat-

Eq. 220; Reg. *v.* Ambergate, &c. Railw., 18 Eng. L. & Eq. 222. In Reg. *v.* Eastern Counties Railw., 10 Ad. & Ellis, 531, it was considered no objection to granting the writ that the company had not the requisite funds, and could not raise them, without a new act.

[4] Reg. *v.* Ambergate, &c. Railw., 18 Eng. L. & Eq. 222.

[5] Reg. *v.* York & N. M. Railw., 16 Eng. Law & Eq. 299, not reversed upon these points. Reg. *v.* L. & Y. Railw., 16 Eng. L. & Eq. 327.

[6] 9 Anne, c. 20; Reg. *v.* Mayor of Cambridge, 2 T. R. 456; 4 Burrow, 2008; Rex *v.* Mayor of York, 5 T. R. 66.

[7] Reg. *v.* St. Pancras, 6 Ad. & Ellis, 314; State *v.* Directors of Bank, 28 Vt. 594.

[8] Clarke *v.* Leicestershire & Northamptonshire Canal Co., 3 Railw. C. 730.

[9] Reg. *v.* Birmingham & Gloucester Railw., 2 Railw. C. 694; Rex *v.* Ouse Bank Commissioners, 3 Ad. & Ellis, 544.

ters contained in the alternative writ are finally determined in favor of the application.[10]

8. The court will not quash a return summarily, or order it taken off the file, unless it is frivolous, so as to be an obvious insult, and contempt of court.[11]

9. No excuse for non-compliance with a peremptory writ of mandamus is admissible.[12] It is no ground of objection to a mandamus, that a requisition is made on parties in the alternative, to do one of three things, if the duty enjoined by the act of parliament forms one of them, and there has been a general refusal to comply with the requisition.[13] And the demand for the rate in this case was held sufficient, notwithstanding the church-wardens required the vestry to lay the rate, or do another act, which last was illegal.[13]

*SECTION VI.

Where the alternative Writ requires too much, it is bad, for that which it might have maintained.

§ 195. It seems to be well settled in the English practice, that if the writ issue, in the first instance, for some things which defendant is not bound to do, it cannot be supported, even as to those things which he is compellable to perform.[1] But the writ

[10] Reg. *v.* Baldwin, 8 Ad. & Ellis, 947. This was where the alternative writ required two sums of money to be paid, and it had been found that one of the sums was due, and the inquiry was not finished in regard to the other. The court refused to grant a peremptory writ for the payment of the sum, about which the controversy was ended.

[11] Reg. *v.* Payn, 3 Nev. & P. 165; The King *v.* Round, 5 Nev. & M. 427. But the return to a writ of mandamus must be very minute in showing why the party did not do what he was commanded to do. Reg. *v.* Port of Southampton, 1 El. B. & S. 5; s. c. 7 Jur. N. S. 990; 30 L. J. Q. B. 244.

[12] Reg. *v.* Mayor of Poole, 1 Q. B. 616. But after judgment for the crown, on a return to a writ of mandamus, the defendants having voluntarily, and with the prosecutor's assent, done the act commanded, the court will quash a peremptory writ of mandamus as unnecessary, and an abuse of the process of the court. Reg. *v.* Saddlers' Company, 33 L. J. Q. B. 68.

[13] Reg. *v.* St. Margarets, Leicester, 8 Ad. & Ellis, 889.

[1] Reg. *v.* Caledonian Railw., 3 Eng. L. & Eq. 285; Reg. *v.* East & West India Docks & Birm. Junc. Railw., 22 Eng. L. & Eq. 113.

may be awarded to complete such portions of their road as the company are still compellable to build, although from lapse of time it has become impossible to build the entire road.[2]

But if the alternative writ commands more than is necessary to be done to comply with the statute, it will be quashed, notwithstanding the party might have been entitled to this remedy to a certain extent.[3]

SECTION VII.

Enforcing Payment of Money awarded against Railways.

1. *The enforcement of payment of money against corporations by mandamus.*
2. *Where debt will lie, the party not entitled to mandamus.*
3. *Mandamus proper to compel payment of compensation under statute.*
4. *Mandamus not allowed in matters of equity jurisdiction.*
5. *Contracts of company not under seal enforced by mandamus.*
6. *Where a statute imposes a specific duty, an action will lie.*

§ 196. 1. It seems to have been the more general practice to enforce the payment of money awarded against a corporation, in pursuance of a statute duty, by mandamus, where no other specific remedy is provided.[1]

[2] Reg. *v.* York & North M. Railw., 16 Eng. L. & Eq. 299. This case was reversed in Exchequer Chamber upon other grounds.

[3] York & North Midland Railw. *v.* Milner, 3 Railw. C. 774, reversing, in the Exchequer Chamber, The Queen *v.* York & N. M. Railw., 3 Railw. C. 764.

[1] The King *v.* Nottingham Old Waterworks, 6 Ad. & Ellis, 355; Rex *v.* Trustees of Swansea Harbor, 8 Ad. & Ellis, 439. In this case one party moved for a *certiorari* with a view to quash the proceedings, and the other for a mandamus to carry them into effect. The rule for the former was discharged, and for the latter made absolute. Reg. *v.* Deptford Improvement Co., 8 Ad. & Ellis, 910. Where a city council is authorized and required by law to levy and collect a tax upon the real and personal property of the city, sufficient to pay the interest upon bonds issued by the city in payment of a subscription to the stock of a railroad company, and the council refuses to do so, and there is no specific legal remedy provided for such refusal, mandamus may be issued to compel them to perform that duty, at the instance of holders to whom the bonds have passed from the company. An express or explicit refusal in terms is not necessary to put the respondents in fault; it will be sufficient that their conduct makes it clear that they do not intend to do the act required. The writ, in such case, may be applied for by any of the bondholders; and it is not necessary that all

* 2. But it has been held that an action of debt will lie upon the inquest and assessment of compensation for land.[2] And where, in granting to a railway the right to erect a bridge across the river Ouse, it was provided in the act of parliament, that, if the erection of such bridge should lessen the tolls of another bridge company upon the same river, after a trial of three years, as compared with the three years next preceding the erection of the railway bridge, the railway company should pay to the bridge company a sum equal to ten years' purchase of such annual decrease of tolls; it was held that debt will lie for such purchase, and that mandamus is no more effectual remedy and ought not to be granted.[3] If the party have no right to execution, upon an award, mandamus will be awarded, otherwise not.[4]

3. So the court will not enforce an ordinary matter of contract or right, upon which action lies in the common-law courts, as to compel common carriers to perform their public duties, or special contracts,[5] the statute not requiring them to carry all goods offered. But where compensation is claimed for damages done under a statute, the proper remedy is by mandamus, al-

the bondholders should be parties to it. Nor is it necessary to make the railroad corporation, to which the bonds were originally executed, or the tax-payers of the city, or the commonwealth, parties to the bills, in Kentucky. And it is no objection to the issuing of the writ that an action has been brought against the city, upon some of the coupons, such action having been dismissed before judgment, on the petition for mandamus. Maddox *v.* Graham, 2 Met. (Ky.) 56.

It is laid down in the above case, that a proceeding for a mandamus against the city council is virtually a proceeding against the corporation, and the judgment is obligatory upon the members of the common council who may be in office at the time of its rendition. And a change in the membership of this council does not so change the parties as to abate the proceeding. Ib.

[2] Corrigal *v.* The London & Blackwall Railw., 5 Man. & Gr. 219.

[3] Reg. *v.* The Hull & Selby Railw., 6 Q. B. 70; Williams *v.* Jones, 13 M. & W. 628. Courts of equity will not interfere where there is a remedy before sheriffs' jury. East and West India D. & B. Railw. *v.* Gattke, 3 Eng. L. & Eq. 59.

[4] Rex *v.* St. Catherine's Dock Co., 4 Barn. & Ad. 360; Corpe *v.* Glyn, 3 B. & Ad. 801; Reg. *v.* The Victoria Park Co., 1 Q. B. 288. And in this case *Denman*, Ch. J., says, the court should not go beyond our extraordinary interposition by mandamus, to require a corporation to make a call upon the shareholders, to pay debts, where the legislature had intrusted them with that power, and they had no standing capital.

[5] *Ex parte* Robbins, 7 Dowl. P. Cases, 566.

though the party may claim that the company went beyond their powers, and thus committed a wrong for which the proper remedy is an action.[6]

4. Nor will mandamus lie where the proper remedy is in equity,[7] and the right is one not enforceable at law, but only in equity, as in * matters of trust and confidence. But in a case where the act of incorporation allowed the company to sue and to be sued in the name of their clerk, it was held that execution could not issue against the clerk personally, and in giving judgment, *Tindal*, Ch. J., said: "There can be no doubt but that the funds of the trustees may be made answerable for the amount ascertained in the action, in case of a refusal to apply them, either by a mandamus or a bill in equity."[8]

5. And where, after a rule *nisi*, for a mandamus to compel the company to summon a jury to assess compensation to land-owners, a contract was entered into between the land-owners and the agent of the company, wherein they agreed upon the payment of a stated sum, and also a weekly compensation; upon the payment of the stated sum, and the execution of the contract, the proceedings were discontinued. The company paid the weekly sum for a time, and then discontinued the payment. The application for mandamus being renewed, the court held, that, as the contract was not under their seal, no action will lie upon it, against the company,[9] and it should therefore be enforced by mandamus.[10]

[6] Reg. *v.* North Mid. Railw., 2 Railw. C. 1; 11 Ad. & Ellis, 955; Thicknesse *v.* Lancaster Canal Co., 4 M. & W. 472; Fenton *v.* Trent & Mersey Nav. Co., 9 M. & W. 203; Rex *v.* Hungerford Market Co., 3 Nev. & M. 622.

[7] Rex *v.* The Marquis of Stafford, 3 T. R. 646. See Edwards *v.* Lowndes, 1 Ellis & B. 92; 20 L. J. Q. B. 404; 16 Eng. L. & Eq. 204. The relation of trustee and *cestui que trust* gives no right of action at law for money due. Pardoe *v.* Price, 16 M. & W. 451. The proper remedy is in equity, and mandamus will not lie. Reg. *v.* Trustees of Balby & Worksop Turnpike, 16 Eng. L. & Eq. 276.

[8] Wormwell *v.* Hailstone, 6 Bing. 668.

[9] Reg. *v.* Mayor of Stamford, 6 Q. B. 433.

[10] Reg. *v.* Bristol & Exeter Railw., 3 Railw. C. 777. This seems to us rather a refinement. If the contract was really obligatory upon the company, it might as well be the foundation of an action, as to be enforced by mandamus. In Tenney *v.* East Warren Lumber Company, 43 N. H. R. 343, it was held, that

6. It seems to be the general rule of the English law, that where a statute imposes a specific obligation or duty upon a corporation, an action will lie to enforce it, founded upon the statute, either debt or case, according to the nature of the claim.[n]

SECTION VIII.

The Writ sometimes denied in Matters of Private Concern.

1. *Mandamus denied to compel company to divide profits.*
2. *Allowed to compel production and inspection of corporation books.*
3. *Will compel the performance of statute duty, but not to undo what is done.*
4. *Allowed to compel the production of the register of shares, or the registry of the name of the owner of shares, and in other cases.*
5. *It is the common remedy for restoring persons to corporate offices of which they are unjustly deprived.*

§ 197. 1. Where the charter and subsequent acts relating to * the Bank of England required the corporation to divide their profits semi-annually, a mandamus to compel the production of the books of the company, so as to show an account of their net income and profits, since the last dividend was declared, more than six months having elapsed, was denied.[1] *Abbott*, Ch. J., said it was in effect "an application, on behalf of one of several partners, to compel his copartners to produce their accounts of profit and loss, and to divide their profits, if any there be." It was also said, that this might very properly be done in a Court of Chancery, but a court of law is a very unfit tribunal for such a subject. "A mere trading corporation differs materially from those which are intrusted with the government of cities and towns, and therefore have important public duties to perform." *Bayley*, J., said: "The court never grant this writ, except for public purposes, and to compel the performance of

evidence that a deed purporting to be the deed of a corporation was executed by agents duly authorized by it, is *primâ facie* evidence that any seal affixed to it has been adopted by the corporation for that occasion. And the same point is maintained in Ransom *v.* Stonington Savings Bank, 2 Beasley, 212.

[n] Tilson *v.* Warwick Gas-Light Co., 4 B. & Cres. 962; Carden *v.* General Cemetery Co., 5 Bing. (N. C.) 253.

[1] Rex *v.* The Bank of England, 2 B. & Ald. 620.

public duties." *Best*, J., said: "If we were to grant this rule we should make ourselves auditors to all the trading corporations in England."

2. But in a later case[2] it was held, that mandamus may be granted to compel the production and inspection of corporation books and records at the suit of a corporator, where a distinct controversy has already arisen, and the relator is interested in the question, and the former cases upon the subject are elaborately reviewed, and held to confirm this view.[3]

3. The court has refused to grant a mandamus to a private trading corporation, to permit a transfer of stock to be made in their books.[4] In a late case (1850) the writ was applied for, to compel a railway company to take the company seal off the register of shareholders.[5] Lord *Campbell*, Ch. J. said: "If I had the smallest doubt, I would follow the example of the high tribunal (Q. B. in Ireland), which is said to have complied with a similar application. But having no doubt, I am bound to act on my own view. The writ of mandamus is most beneficial, but *we must keep its operation within legal bounds, and not grant it at the fancy of all mankind. We grant it when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done."[6] "It is said the court will compel the corporation to affix its seal, when it refuses to do

[1] Rex *v.* Merchant Tailors' Company, 2 B. & Ad. 115.

[2] Rex *v.* Hostmen of Newcastle-upon-Tyne, 2 Strange, 1223. So to inspect the court roll of a manor, at the instance of a tenant who has in interest in a pending question, and has been refused permission to inspect the court rolls by the lord of the manor. Rex *v.* Shelley, 3 T. R. 141. But not otherwise. Rex *v.* Allgood, 7 T. R. 746. But it is not necessary a suit shall be pending, if a distinct question have arisen. R. *v.* Tower, 4 M. & S. 162. And in an action against an incorporated company, which had ceased to carry on business, a director of the company may be ordered by the court or a judge to give the plaintiff inspection of documents not denied to be in his possession, or under his control. Lacharme *v.* Quartz Rock Mariposa Gold Mining Company, 31 L. J. Exch. 335; s. c. 6 L. T. N. S. 502.

[3] Rex *v.* The London Assurance Company, 5 B. & Ald. 899.

[4] Nash *ex parte*, 15 Q. B. 92.

[5] The office of the writ of mandamus is to stimulate and not to restrain the exercise of official functions; and after the officers have performed the duties imposed upon them, they are no longer subject to it. School Directors of Bedford Borough *v.* Anderson, 45 Penn. St. 388.

so, without legal excuse, but will not try the legality of an act, professedly done in pursuance of a statute." The difference seems to be one of form rather than substance, and to rest mainly upon the consideration, that after the act is done, its legality had better be tested in the ordinary mode, by an action at law or in equity.

4. But the writ has been granted to compel the production of a register of shareholders, to enable a creditor to proceed against them.[7] So, too, to compel the registry of the name of the owner of shares, properly transferred, or of the name of the personal representative, in case of the decease of the owner.[8] But in some cases of peculiar necessity for specific aid by way of mandamus, as the delivery of a key to the party entitled to hold it, by the foundation of a private charity,[9] the writ has been awarded.

5. And there can be no doubt the Court of King's Bench has almost immemorially been accustomed to try the validity of municipal and other public corporate elections by *quo warranto*, which, in case of illegality found, will displace the incumbents, but not establish those rightfully entitled to the function,[10] man-

[7] Reg. *v.* Worcestershire & Stafford. Railw., Q. B. Weekly R. 1853 – 54, 482.

[8] *Ante*, § 42 and § 44; Reg. *v.* L. & C. Railw., 13 Q. B. 998. No question is made here but the court will compel the company, by mandamus, to enter a transfer upon their books in a proper case, but the application was denied on other grounds. See Reg. *v.* Midland Counties & Sh. J. Railw., 9 L. T. N. S. 151, 155. And see Helm *v.* Swiggett, 12 Ind. R. 194. But not where inspection of the certificate of shares was refused to the directors. East Wheal Martha Mining Co., *in re*, 33 Beav. 119.

[9] Reg. *v.* Abrahams, 4 Q. B. 157.

[10] Rex *v.* Williams, 1 Bur. 402; Rex *v.* Hertford, 1 Ld. Ray. 426; 1 Sal. 374; Rex *v.* Breton, 4 Burrow, 2260; Rex *v.* Cambridge, 4 Bur. 2008; Rex *v.* Tregony, 8 Mod. 111, 127; Rex *v.* Turkey Co., 2 Burrow, 999; Anonymous, 2 Strange, 696.

In some English cases the King's Bench seems to have altogether disregarded the distinction between public and private corporations, in exercising control over their functionaries. Rex *v.* Bishop of Ely, 2 T. R. 290. And in Rex *v.* St. Catherine's Hall, 4 T. R. 233, the refusal to grant the writ seems to be placed altogether upon other grounds. But it seems a mandamus will not be awarded to compel a voluntary society to recognize the rights of the minority. The King *v.* Gray's Inn, Douglass, 353; Rex *v.* Lincoln's Inn, 4 B. & C. 855. Where there is already one in the office *de facto*, mandamus will not be award-

damus * being requisite for that purpose. But whatever may be the English rule in regard to merely private corporations, it is certainly settled in this country that the courts will try the validity of an election and the question of usurpations, and the legality of amotions in private corporations[11] in this mode. But there is one case where the court refused to try the title to an annual office by writ of mandamus, for the reason that it would prove unavailing.[12] But it has been awarded in England to restore a clerk to a butchers' company, a clerk to a company of masons, and sundry similar officers,[13] and in this country, to restore the

ed, *quo warranto* being the proper remedy to try the title of the officer in possession. Rex *v.* Mayor of Colchester, 2 T. R. 259, 260. But in Rex *v.* Thatcher it was awarded to the commissioners of land-tax to admit the person clerk having the majority of legal votes. 1 Dow. & R. 426; The People *v.* The Corporation of New York, 3 Johns. Cases, 79. The St. Louis County Ct. *v.* Sparks, 10 Missouri R. 117; Bonner *v.* State, 7 Georgia R. 473; Clayton *v.* Carey, 4 Maryland R. 26.

[11] Commonwealth *v.* Arrison, 15 S. & R. 131; People *v.* Thompson, 21 Wendell, 235; s. c. 23 Wendell, 537; People *v.* Head, 25 Ill. R. 325; State *v.* Common Council, 9 Wisc. R. 254; State *v.* Boston, Concord, & M. R., 25 Vt. R. 433; In the matter of the White River Bank, 23 Vt. R. 478; Commonwealth *v.* The Union Fire and Marine Insurance Co., 5 Mass. R. 231; State *v.* Ashley, 1 Pike, 570; St. Luke's Church *v.* Slack, 7 Cush. 226. But in Gorman *v.* Board of Police, 35 Barb. 527, it is intimated that mandamus will not issue to restore an officer removed in an illegal manner, but for a sufficient cause. Martin *v.* Board of Police, Id. 550. See to the same point Barrows *v.* Mass. Medical Society, 12 Cush. 402. And *a fortiori* mandamus lies where the office concerns the public or the administration of justice. Lindsey *v.* Luckett, 20 Texas R. 516; Felts *v.* Memphis, 2 Head, 650.

[12] Howard *v.* Gage, 6 Mass. R. 462. But this case was decided upon the ground that the statute of Anne not being in force in that state, the truth of the return to the alternative writ could not be tried till the term would expire. But the decision is scarcely maintainable even upon that ground. But it was held a good defence to a writ of mandamus to compel a township treasurer to pay an order for a teacher's salary, that his term of office had expired, and all the funds in his hands had in good faith been paid over to his successor. State *v.* Lynch, 8 Ohio St. 347.

[13] Angell & Ames on Corporations, § 704. And where, by the custom of a parish, one churchwarden was appointed annually by the parishioners, and one annually by the rector, and the latter appointed a person who was not an inhabitant of or an occupier of property in the parish, it was held that a mandamus to the rector to appoint a churchwarden was the proper process by which to question the validity of the appointment. Barlow *in re*, 30 L. J. Q. B. 271;

trustee of a private academic corporation,[14] a member of a religious corporation, and many similar officers.[15]

*SECTION IX.

This Remedy lost by Acquiescence. — Proceeding must be Bonâ Fide.

1. *Remedy must be sought at earliest convenient time.*
2. *Courts will not hear such case, merely to settle the question.*
3. *In New York may be brought any time within statute of limitations.*

§ 198. 1. The right to interfere in the proceedings of a corporation by mandamus, is one of so summary a character, that it should be asserted at the earliest convenient time, or it will not be sustained.[1] And especially where, in the mean time, the

s. c. 5 L. T. N. S. 289. And see Reg. *v.* Hearts of Oak Benefit Society, 13 W. R. 724.

[14] Fuller *v.* The Trustees of the Academic School in Plainfield, 6 Conn. R. 532. The opinion of *Daggett*, J., here discusses the power of amotion of trustees and officers by eleemosynary corporations somewhat at length, and comments very judiciously upon the cases upon the subject.

[15] Green *v.* The African Methodist Ep. Society, 1 Serg. & R. 254; Commonwealth *v.* St. Patrick Benevolent Society, 2 Binney, 441, 448; Commonwealth *v.* The Philanthropic Society, 5 Binney, 486; Commonwealth *v.* Penn. Ben. Institution, 2 Serg. & R. 141; Franklin Ben. Association *v.* Commonwealth, 10 Barr, 357; Commonwealth *v.* The German Society, 15 Penn. St. 251. But if the society have the absolute power of expulsion, it would seem their judgment in the matter is not revisable. s. c.

But it was said, a private person who makes a highway upon his own land, and dedicates it to public use, had no such interest in the highway as to enable him to sue for penalties given against a railway which had cut through the highway and not restored it, and a mandamus to enforce the recovery of such penalty was denied on the ground that the prosecutor had no public duty in regard to the highway. Reg. *v.* Wilson, 11 Eng. L. & Eq. 403.

[1] Rex *v.* Stainforth & Keadby Canal Co., 1 M. & S. 32; Rex *v.* The Commissioners of C. Inclosure, 1 B. & Ad. 378; Reg. *v.* Leeds and Liverpool Canal Co., 11 Ad. & Ell. 316; Lee *v.* Milner, 1 Railw. C. 634, Appendix; Reg. *v.* London & N. W. Railw., 6 Rail. C. 634, and Reg. *v.* Lancashire & Yorkshire Railw., Id. 651. So, in Connecticut, where by statute a school district can change its school-house only by a two thirds vote, and a district which has an established school-house voted by a less majority to have the school kept for the

facilities for accomplishing a public work, or the public demand for it have materially changed, the writ will not be awarded.[2] But it is often proper and necessary to wait till public works are completed, before moving for the writ.[3]

2. The English courts decline to hear applications for mandamus, which are not *bonâ fide*, but merely to obtain the opinion of the court,[4] even where the prosecutor may have *bonâ fide* purchased shares in the corporation, but for the mere purpose of trying a question in which the public have an interest.[4]

3. In New York it was held, that as there was no special limitation upon this remedy, it might be brought within the time fixed for the limitation of other similar or analogous remedies.[5] But this rule seems liable to objection in many cases. The English rule, that the party should suffer no unreasonable delay, in the opinion and discretion of the court, seems more just and equitable, and is countenanced by other American cases.[6] The late decisions of the English courts are very strict upon this point.[7]

season in a room furnished for the purpose within half a mile from the school-house, more convenient for the children generally, and the district committee kept the school there, a mandamus, being applied for by some members of the district, tax-payers therein, and some of whom had children whom they wished to send to the school, to compel the district committee to have the school kept in the school-house, it appearing that at the time of the application the term of the school had half expired, and had nearly expired at the time of the hearing, this was held not to be such a case as called imperatively for the interposition of the court by mandamus, it not appearing to be a permanent attempt to change the place of the school. Colt *v.* Roberts, 28 Conn. R. 330. See State *v.* Lynch, 8 Ohio St. 347.

[2] Reg. *v.* Rochdale & Halifax T. Railw., 12 Q. B. 448.

[3] Parkes *ex parte*, 9 Dowl. P. C. 614; *Ante*, § 88. Reg. *v.* Bingham, 4 Q. B. 877; 3 Railw. C. 390.

[4] Reg. *v.* Liverpool, M. & N. Railw., 21 L. J. Q. B. 284; 16 Jur. 149; 11 Eng. L. & Eq. 408; Reg. *v.* Blackwall Railw., 9 Dowl. P. Cas. 558.

[5] The People *v.* The Supervisors of West Chester, 12 Barb. 446.

[6] Mayor, &c. of Savannah *v.* State, 4 Ga. R. 26.

[7] Reg. *v.* Townsend, 28 Law Times, 100 (Nov. 1856).

*SECTION X.

Mandamus allowed where Indictment lies.

1. *Party may have mandamus sometimes where act is indictable.*
2. *Allowed to compel company not to take up their rails.*
3. *Will not lie, where there is other adequate remedy.*

§ 199. 1. It seems to have been considered that the fact that a railway or other corporation had exposed themselves to indictment by the very act or omission proposed to be remedied by mandamus, was no sufficient answer to the application.[1] But we are not to understand by this that the two remedies are regarded as in any just sense concurrent, and at the election of the party injured. An indictment is ordinarily no adequate redress for private wrongs. The case of a nuisance, put by Lord *Denman*, in the last case, illustrates the subject fairly. The indictment only redresses the public wrong inflicted by a nuisance. One who suffers special damage is entitled to a private action, and sometimes to specific redress, in equity or by mandamus.

2. Hence, where a railway company, after having completed their road, under an act of parliament, by which it was provided the public should have the beneficial enjoyment of the same, proceeded to take up the railway, a mandamus was awarded to compel them to reinstate it.[2]

[1] Reg. *v.* Bristol Dock Co., 2 Railw. C. 599; Reg. *v.* Manchester & Leeds Railw., 3 Q. B. 528.

[2] Rex *v.* The Severn & Wye Railw., 2 B. & Ald. 646. *Abbott*, Ch. J., said, in giving judgment: "If an indictment had been a remedy equally convenient, beneficial, and effectual as a mandamus, I should have been of opinion that we ought not to grant the mandamus"; but it is not, "for a corporation cannot be compelled, by indictment, to reinstate the road."

"The court may, indeed, in case of conviction, impose a fine, and that fine may be levied by distress; but the corporation may submit to the payment of the fine and refuse to reinstate the road." Grant on Corp. 270. And in State *v.* Hartford & New H. Railw. Co., 29 Conn. R. 538, this writ was awarded to compel the defendants to continue to run trains to connect with the steamboats on the Sound, after the company had formed a connection with the New Haven & New York Railw., and had discontinued running trains across that portion of their

3. And it may safely be affirmed that the mandamus will be denied where there is other adequate remedy.[3]

*SECTION XI.

Judgment upon Petition for Mandamus revisable in Error.

§ 200. In those states where the court having jurisdiction to award the writ of mandamus is not the court of last resort, the judgment upon applications for such writs is revisable upon writ of error.[1] But it is said not to be the province of a court of error to issue the writ of mandamus, unless the power is conferred by statute.[2]

road which connected with the steamboats. And it was here considered that a contract with the connecting railway to discontinue connection with the steamboats for some equivalent benefit to both companies was void, as against good policy, and that it was a proper case for the public attorney to interfere by way of petition for mandamus.

[3] Reg. *v.* Gamble & Bird, 11 Ad. & Ell. 69; Reg. *v.* Victoria Park Co., 1 Q. B. 288; Draper *v.* Noteware, 7 Cal. R. 276; Williams *v.* Judge of County Court, 27 Miss. R. 225; Trustees *v.* State, 11 Ind. R. 205; Bush *v.* Beavan, 1 H. & C. 500; s. c. 32 L. J. Exch. 54. But in People *v.* Hilliard, 29 Ill. R. 413, the court hold, that it is not indispensable that the petition should state that the relator is without any other sufficient remedy. If such appear to the court to be the fact, the alternative writ will not be quashed. Id. But see School Board *v.* People, 20 Ill. R. 525, *contra*. People *v.* Wood, 35 Barb. 653; Goodwin *v.* Glazer, 10 Cal. R. 333. But the existence of an equitable remedy is no ground for refusing mandamus. Commonwealth *v.* Comm. of Alleghany, 32 Penn. St. 218.

[1] Reg. *v.* The Manchester & Leeds Railw., 9 Q. B. 528, reversing the judgment of K. B. in s. c. 1 Railw. C. 523, this last hearing being in the Exchequer Chamber. 6 & 7 Vict. ch. 67, § 2, gives the right to a writ of error. But upon general principles, it is as much revisable as judgment upon *habeas corpus*. Holmes *ex parte*, 14 Pet. S. C. U. S. 540. Cowell *v.* Buckelew, 14 Cal. R. 640. See also Columbia Ins. Co. *v.* Wheelright, 7 Wheat. 534. The matter of granting the writ of mandamus, being discretionary in the court, should not preclude a revision of the questions decided by the court below as matter of law. When the writ is denied as matter of discretion, that judgment is of course not revisable in a court of error.

[2] Angell *v.* Ames on Corp., § 697.

*CHAPTER XXVII.

WRIT OF CERTIORARI.

SECTION I.

To remove Proceedings against Railways.

1. *Lies to bring up unfinished proceedings, or those not according to the common law.*
2. *This writ is one of very extensive application, unless controlled by statute.*
3. *Where the case is fully heard on the application, judgment may be entered.*

§ 201. 1. WHERE the proceedings against a railway are in a court of record, and according to the course of the common law, after final judgment the writ of error is the appropriate process for their revision in a superior court, and the writ of *certiorari* will not lie.[1] But the *certiorari* is the proper process to bring up an unfinished proceeding,[2] in an inferior court of record, or a

[1] The King *v.* Inhabitants of Pennegoes, 1 Barn. & Cresswell, 142; s. c. 2 Dow. & R. 209; Queen *v.* Dixon, 3 Salk. 78.

Certiorari is the appropriate remedy to revise erroneous rulings of county commissioners, when there is no mode of revision appointed by law. Mendon *v.* County Commissioners, 2 Allen, 463. The same principle is maintained in People *v.* Board of Delegates, 14 Cal. R. 479. It does not lie to review acts simply ministerial, but all acts of a judicial nature, whether of a court or a municipal board. Robinson *v.* Supervisors, 16 Cal. R. 208. And see, to the same point, People *v.* Board of Health, 33 Barb. 344; People *v.* Hester, 6 Cal. R. 679; Borough of Sewickley, 2 Grant's Cases, 135; Justice, &c. *v.* Hunt, 29 Ga. R. 155. But see Camden *v.* Mulford, 2 Dutch. 49; State *v.* Jersey City, Id. 444. The power of review on a common-law *certiorari* extends not only to questions affecting the jurisdiction of the magistrate and the regularity of the proceedings before him, but to all other legal questions. Mullins *v.* People, 24 N. Y. R. 399; Jackson *v.* People, 9 Mich. R. 111. But see People *v.* Van Alstyne, 32 Barb. 131; People *v.* Board of Delegates, 14 Cal. R. 179. Only questions raised by the record can be considered. People *v.* Wheeler, 21 N. Y. R. 82. And see Frederick *v.* Clarke, 5 Wisc. R. 191; Greenway *v.* Mead, 2 Dutch. 303; Low *v.* Galena & Chicago Railw., 18 Ill. R. 324; Mayo County *in re*, 14 Ir. Com. Law R. 392.

[2] The writ of *certiorari* before judgment corresponds to the writ of *error* after it. Commonwealth *v.* Simpson, 2 Grant's Cases, 438. And a proceeding by

summary proceeding in such court, not according to the course of the common law, after judgment thereon, and where there is alleged error in the proceedings.[1]

2. This writ is of universal application, unless taken away by the express words of the statute, or where the superior court is not the proper tribunal to proceed with the cause.[3] And in such case the cause may be brought up, and any error corrected, and then remanded to the inferior court, with a writ of mandamus, in the nature of a *procedendo;* or the mandamus may be awarded, in the first instance, directing the inferior court to proceed and finish the case upon its merits.[4]

certiorari is like an appeal, and is governed by the same rules, so that the plaintiff can dismiss the case in the appellate court, and leave the whole matter as if no steps had been taken therein. Joliet, &c. Railw. *v.* Barrows, 24 Ill. R. 562.

[3] Where a party has had no notice of an assessment of damages for land taken, until after the time limited for the appeal has expired, he may have the decision reviewed by *certiorari.* Joliet, &c. Railw. *v.* Barrows, 24 Ill. R. 562. And see McConnell *v.* Caldwell, 6 Jones Law, 469; Aycock *v.* Williams, 18 Texas R. 392. In the last case it was held, that, if a justice of the peace grant a new trial without notice to the adverse party, who does not appear at the second trial, the latter may either enjoin the collection of the judgment thus rendered, or remove the cause to the District Court by *certiorari.* And *certiorari* will be granted to bring up an order of Quarter Sessions which was void on the ground of interest in the justices. See McHeran *v.* Melvin, 3 Jones Equity, 195; Darling *v.* Neill, 15 Texas R. 104; Robson *in re*, 6 Mich. R. 137; Clary *v.* Hoagland, 5 Cal. R. 476. And one against whom a judgment is sought to be enforced, though not a party to the proceedings, may apply for a *certiorari.* Clary *v.* Hoagland, *supra.* And see Reg. *v.* Bell, 8 Cox, C. C. 28; Reg. *v.* Hammond, 12 W. R. 208; Reg. *v.* London & Northwestern Railw., 12 W. R. 208.

[4] Woodstock *v.* Gallup, 28 Vt. R. 587; Ottawa *v.* Chicago, &c. Railw., 25 Ill. R. 43. And in New York the only way of reviewing a decision of a justice of the peace in summary proceedings is by a *certiorari.* Romaine *v.* Kinshimer, 2 Hilton, 519; Reg. *v.* Bristol & Exeter Railw., 11 Ad. & Ellis, 202; Crosse *v.* Smith, 3 Salk. 79. It is here said: "There is no jurisdiction which can withstand a *certiorari.* But if the *certiorari* be taken away, by the express words of the statute, the court will not indirectly accomplish the same thing by mandamus. Rex *v.* Justices of W. R. of York, in the Matter of Railway, 1 Ad. & E. 563; Rex *v.* Fell, 1 B. & A. 380; Rex *v.* Saunders, 5 Dow. & R. 611. Where the *certiorari* upon a given subject is taken away by act of parliament, it must be understood as extending only to the terms of the act, and for something done in pursuance of it. *Denman,* Ch. J., Reg. *v.* Sheffield, A. & M. Railw., 1 Railw.

* 3. Where the case is fully heard, in regard to its merits, upon the rule to show cause, and there is no dispute about the facts, it is common for the Court of King's Bench to give judgment, without waiting for the record to be brought up on *certiorari*,[5] similar to the course we have intimated in regard to applications for mandamus.[6]

SECTION II.

Where there is an Excess of Jurisdiction.

§ 202. Where there is an excess of jurisdiction, the appropriate remedy ordinarily is by action of trespass. And in such cases the court have more commonly refused to give redress, either by *certiorari* or mandamus.[1] But it is not considered that a statutory provision, taking away the writ of *certiorari*, for anything

C. 537, 545. *Patteson*, J., "Where there is a total want of jurisdiction and parties have proceeded in defiance of *certiorari*, it is not taken away." South Wales Railw. Co. *v.* Richards, 6 Railw. C. 197.

See Jubb *v.* Hull Dock Co., 9 Q. B. 443. *Denman*, Ch. J., intimates, that where the *certiorari* is taken away, in regard to proceedings under an act of parliament, that will not deprive the party of that remedy, when the proceeding is complained of, as not coming within the act, although some part of the proceedings are confessedly within the act, citing Rex *v.* The Justices of Kent, 10 B. & C. 477. See Reg. *v.* St. Olaves, 8 Ellis & Bl. 529. The right to have proceedings reversed in the Supreme Court does not deprive the party of the right to bring *certiorari*. Vanwickle *v.* C. & A. Railw.; Bennett *v.* Same, 2 Green, 145, 162. A *certiorari* suspends all proceedings in a case till it is decided. Taylor *v.* Gay, 20 Ca. R. 77.

[5] *In re* Edmundson, 24 Eng. L. & Eq. 169. This was a case where the statute required the complaint to be made within six months after the cause of action arose, and for noncompliance with this requirement the court held the proceedings liable to be quashed, and granted the *certiorari*.

[6] *Ante*, § 190. On *certiorari* the court will not reverse a judgment for error in taxing costs, but will correct the error in this respect. Marshall *v.* Burton, 5 Harring. (Del.) 295.

[1] Reg. *v.* Bristol & Exeter Railw., 2 Railw. C. 99; 11 Ad. & Ellis, 202; Reg. *v.* Sheffield & Ashton-under-Lyne & Manchester Railw. C. 537, 545. The court will rarely grant this writ where the party has an opportunity to litigate the question in action at law. People *v.* Board of Health, 33 Barb. 344. And see Baltimore, &c. Co. *v.* Northern, &c. Railw., 15 Md. R. 193; Peabody *v.* Buentillo, 18 Texas R. 313; Clary *v.* Hoagland, 13 Cal. R. 173.

done under the act of incorporation, or the general statutes as to railways, applies to things done wholly without the jurisdiction conferred.[2]

*SECTION III.

Jurisdiction and Mode of Procedure.

1. *Lies in cases of irregularity, unless taken away by statute.*
2. *Inquisitions before officers, not known in the law.*
3. *Granting the writ is matter of discretion. Defects not amendable.*

§ 203. 1. Although it is held that a statutory provision, denying the *certiorari*, is to be limited to matters within the jurisdiction conferred, and will not restrict the power of the court in regard to matters wholly beyond the jurisdiction, the same rule cannot be extended to mere irregularity in the exercise of the jurisdiction. For unless the prohibition of the writ could apply to such cases, it could have no application, and it is incumbent upon the court to give it a reasonable operation and construction.[1]

2. An inquisition taken before two under-sheriffs extraordinary, will be set aside on that ground.[2] But an inquisition taken before a clerk of the under-sheriff, and an assessor appointed *pro hac vice* by the sheriff, although none of the persons named in the act, for such an office, will not be quashed on *certiorari*.[3]

[2] *Ante*, § 201; Reg. *v.* Sheffield, A. & M. Railw., 1 Railw. C. 545; South Wales Railw. *v.* Richards, 6 Railw. C. 197; Reg. *v.* Lancashire & Preston Railw., 6 Q. B. 759; 3 Railw. C. 725. Where a jury, summoned under 8 & 9 Victoria, ch. 18, § 68, have taken into consideration, in awarding compensation, one claim, among others, as to which they had no jurisdiction, a *certiorari* lies, although such excess of jurisdiction does not appear upon the face of the proceedings, but it may be shown by affidavit. Penny *in re*, 7 Ellis & Bl. 660.

[1] Reg. *v.* Sheffield, A. & M. Railw., 1 Railw. C. 537; 11 Ad. & E. 194.

[2] Denny *v.* Trapnell, 2 Wilson, 379. This decision is upon the ground that the sheriff can only appoint one under-sheriff extraordinary.

[3] Reg. *v.* Sheffield, A. & M. Railw., 11 Ad. & Ellis, 194. Thus showing the disposition of the court to sustain the proceedings when not in contravention of the express terms of the statute.

3. The granting of the *certiorari* is matter of discretion,[4] although there are fatal defects on the face of the proceedings, which it is sought to bring up.[5] The affidavits should swear positively and specifically to the existence of the defects relied upon.[5] And where the party applying for the writ fails, from incompleteness in the affidavits, he will not have a *certiorari* granted him, upon fresh affidavits supplying the defects.[5] The conduct of the prosecutor, especially if it had a tendency to induce the defects complained of, is important to be considered in determining the question of discretion, in regard to issuing the writ.[6]

[4] State *v.* Hudson, 5 Dutch. 115; Lantis *in re*, 9 Mich. R. 324; People *v.* Board of Health, 33 Barb. 344; Johnson *v.* McKissack, 20 Texas R. 160; People *v.* Peabody, 26 Barb. 437; Randle *v.* Williams, 18 Arkansas R. 380; Mayo County *in re*, 14 Ir. Com. Law Rep. 392; Reg. *v.* Reynolds, 13 W. R. 925; s. c. 12 L. T. N. S. 580.

[5] Reg. *v.* Manchester & Leeds Railw., 8 Ad. & Ellis, 413. Lord *Denman* says, "I disclaim the principle, that we are to issue a *certiorari* to bring up the inquisition, on the ground that there may probably be defects; we must clearly see that facts do exist which will bring the defects before us." And an individual member of a corporation cannot carry on suit by bringing *certiorari* in the name of the corporation without the consent of a legal majority of the members thereof. Silk Manufacturing Co. *v.* Campbell, 3 Dutcher, 539.

[6] Reg. *v.* South Holland Drainage, 8 Ad. & E. 429.

*CHAPTER XXVIII.

INFORMATIONS IN THE NATURE OF QUO WARRANTO.

1. *General nature of the remedy.*
2. *Its exercise confined to the highest court of ordinary civil jurisdiction.*
3. *In the English practice, this remedy not extended to private corporations.*
4. *In this country it has been extended to such corporations.*
5. *This remedy will only remove an usurper, but not restore the one rightfully entitled.*
6. *Will not lie where railway company open part of their road.*
7. *Nor where company issue stock below par, or begin to build road before subscription full.*
8. *Form of the judgment.*
9. *Rules in regard to taxing costs.*
10. *Used to test corporate existence and power.*
11. *Penalties provided by charter cannot subsequently be increased to a forfeiture.*
12. *But a grant of corporate franchises may be annulled when its purposes have failed.*
13. Scire facias *the proper remedy to determine forfeiture.*
14. *Insufficient excuses for failure to repair a turnpike road.*

§ 204. 1. This is a subject of very extensive application to corporations, for the purpose of determining when they have forfeited their corporate franchises, or usurped those not rightfully belonging to them, and for numerous other purposes.[1] It will be found treated very much at length in treatises upon corporations.[2] We should scarcely feel justified in going into the subject further here than it has a special application to railways. The form of the proceedings in modern times is by information of the attorney-general, or other public prosecuting officer, on behalf of

[1] See Palmer *v.* Woodbury, 14 Cal. R. 43; Gano *v.* State, 10 Ohio St. 237; Parker *v.* Smith, 3 Minn. R. 240; Cleaver *v.* Commonwealth, 34 Penn. St. 283; People *v.* Ridgely, 21 Ill. R. 65; Scott *v.* Clark, 1 Clarke, 70; Mississippi, &c. Railw. *v.* Cross, 20 Ark. R. 443, 495.

[2] Angell & Ames on Corporations, § 731 – 765. See State *v.* Mississippi, &c. Railw., 20 Ark. R. 443, 495; State *v.* Brown, 5 Rhode Island R. 1; Lindsey *v.* Attorney-General, 33 Miss. R. 508. The information may set forth specifically the ground of forfeiture relied upon, or may call upon the corporation to show by what warrant they still claim to exercise their corporate franchises; and the information, like any other criminal information, is regarded as amendable. Commonwealth *v.* Commercial Bank, 28 Penn. St. 383. And the information must acquaint the court with the charter of the company, so as to show its powers and duties. Danville, &c. Co. *v.* State, 16 Ind. R. 456.

the state, or sovereignty, in the nature of a *quo warranto*, upon which a rule issues to the defendant to show by what warrant he exercises the function or franchise called in question.[3] These proceedings are now very much controlled in England and in the American states by statute defining the form of process and the jurisdiction of the courts in regard to them.

2. In the absence of special provisions, the highest courts of ordinary civil jurisdiction are accustomed to exercise the prerogative right of sovereignty, to issue this process, as well as other prerogative writs, such as a mandamus, certiorari, procedendo, prohibition, &c. In some of the states the courts refuse to exercise any such prerogative rights.[4] And in others this power is, by statute, conferred upon the Court of Chancery; but in other forms.[5]

3. The English courts do not seem to have allowed the exercise of this proceeding in the case of mere private corporations, * although there are numerous cases in the English books of its exercise in regard to municipal corporations,[6] and others of an important public character.

[3] State *v.* Brown, 33 Miss. R. 500.

[4] State *v.* Ashley, 1 Pike (Ark.), 279; State *v.* Turk, Mart. & Yerg. 287; Attorney-General *v.* Leaf, 9 Humph. 753. See also State *v.* Merry, 3 Missouri R. 278; State *v.* McBride, 4 Id. 303; State *v.* St. Louis P. M. & Life Ins. Co., 8 Id. 330, where in the latter state it was held the writ should issue.

In Pennsylvania the Supreme Court has authority to try by *mandamus* or *quo warranto* whether or not a contract entered into between two different corporations is in excess of the lawful powers of either, and if either corporation is exercising rights or franchises to which it is not entitled, then to oust it therefrom; and the proceeding may be either at common law or in equity, provided the right of trial by jury is not interfered with. Commonwealth *v.* Delaware & Hudson Canal Co., 43 Penn. St. 295.

[5] State *v.* Turk, Mart. & Yerg. 287; State *v.* Merchants' Ins. Co., 8 Humph. 253; Attorney-General *v.* Leaf, 9 Id. 753.

[6] Rex *v.* Williams, 1 Bur. 402; Rex *v.* Breton, 4 Burrow, 2260; Rex *v.* Highmore, 5 Barn. & Ald. 771; Rex *v.* M'Kay, 4 B. & C. 351; Smyth *ex parte*, 11 W. R. 754; s. c. 8 L. T. N. S. 458; Reg. *v.* Hampton, 13 L. T. N. S. 431. The same rule obtains in regard to this proceeding in this respect in England as to mandamus.

Ante, § 193; Rex *v.* Sir Wm. Lowther, 1 Strange, 637; Rex *v.* Mousley, 8 Ad. & Ellis, N. S. 957, decided in 1846, where it is held that the mastership of a hospital or a grammar school was not of so public a character as to justify the

4. But there is no question that in the American states this form of proceeding is extended to aggregate corporations in general, and more especially to the case of banks and railways, which partake in some sense of a public character.[7] The general principles which we have found applicable to the subject of mandamus, will, for the most part, apply to this proceeding.[8]

5. The court cannot establish corporate officers, who would have been elected had all the legal votes offered been received by the inspectors.[9] The only remedy is to set aside the election. And the court will not proceed by mandamus to fill an office until the title is first tried.[10]

6. And where a railway company are authorized to make a line, with branches, and they completed a portion of it, but abandoned other parts of it, this is not a public mischief, which will entitle the attorney-general to file an information, in the nature

exercise of this remedy; nor the office of a churchwarden, Barlow *in re*, 30 L. J. Q. B. 271; s. c. 5 L. T. N. S. 289.

[7] Commonwealth *v.* Arrison, 15 Serg. & Rawle, 128; The People *v.* Thompson, 21 Wend. 235; s. c. 23 Ib. 537; Commonwealth *v.* Union Ins. Co., 5 Mass. R. 231; People *v.* River Raisin & Lake Erie Railw., 12 Michigan R. 381. See *ante*, § 197; State *v.* B. Concord & M. Railw., 25 Vt. R. 433; Grand Gulf Railw. and Bank *v.* State, 10 Sm. & M. 427; State *v.* A. P. Hunton and others, 28 Vt. R. 594. But if an election of managers of a corporation be not disputed during their term of office by *quo warranto*, and they are permitted to act throughout their term as managers *de facto*, the legality of the next election cannot be questioned for any vice or irregularity in the first. A writ of *quo warranto* brought during the term of an office may be tried after the term has expired, but title to a term of office already expired, at the issue of the writ, cannot be determined in this manner by proceedings instituted against those afterwards succeeding to the office. Commonwealth *v.* Smith, 45 Penn. St. 59. In Neall *v.* Hill, 16 Cal. R. 145, it is said that the removal of a mere private or ministerial officer of a corporation is a right that belongs to the corporation alone, and the courts have no jurisdiction to remove such officer, or, it seems, even to enjoin him from acting.

[8] Chap. XXVI. And see State *v.* Commercial Bank of Manchester, 33 Miss. R. 474, where the acts and omissions that will allow a forfeiture of the charter by *quo warranto*, are discussed.

[9] In the matter of the Long Island Railw., 19 Wendell, 37; 2 Am. Railw. C. 453. In *quo warranto* against a usurper by a claimant, it is competent for the court to oust the usurper without determining the right of the claimant. Gano *v.* State, 10 Ohio St. 237. See Doane *v.* Scannell, 7 Cal. R. 393; People *v.* Same, Id. 432.

[10] Rex *v.* Truro, 3 B. & Ald. 590.

of a *quo warranto* against the company, to prevent them from opening the part completed, until the whole is perfect.[11]

7. And an information in the nature of a *quo warranto*, under the Massachusetts statute, will not lie against a railway company, in behalf of a stockholder, merely because they issued stock below the par value,[12] and began to construct their road, before the requisite amount of stock was subscribed, it not appearing that the petitioner's private right was thereby put at hazard.[13]

8. The form of the judgment in proceedings of this character will depend upon the facts proved, and the object to be attained. Where the defect in defendant's right is merely formal, like the omission to take the requisite oath, the judgment is for a suspension of the exercise of the function until qualified by compliance with the requisite formality.[14] But if there be shown, or

[11] Attorney-General *v.* Birmingham Junction Railw., 8 Eng. L. & Eq. 243.

[12] See Howe *v.* Derrel, 43 Barb. 504; Commonwealth *v.* Farmers' Bank, 2 Grant's Cas. 392.

[13] Hastings *v.* Amherst & Belchertown Railw., 9 Cush. 596. In this case the charter provided that the road extend "through Amherst." Another section of the charter provided that the road might be divided into two sections, one extending "to the village of Amherst," and the other from "Amherst to Montague." It was held, that taking land for the road, upon a route not terminating "in either village of Amherst," was not the exercise of a franchise, not granted by the charter.

Any material departure from the points designated in the charter for the location of a railroad, is a violation of the charter, for which the franchise may be seized upon *quo warranto*, unless the legislature has waived this right of the state by acts recognizing the legality of such violation of the charter. Mississippi, &c. Railw. *v.* Cross, 20 Ark. R. 443.

Where an act incorporating a railroad provided that no subscription should be received and allowed, unless there should be paid to the commissioners at the time of subscribing five dollars per share, and this provision was not complied with, but the corporation organized itself, elected directors, &c., and began the construction of its road, by making contracts to grade it, some of the contractors not being aware of this failure to make the stipulated payment on the shares at subscription, and one of the stockholders, who was aware of that failure when he became a stockholder, and who had voted at the election of directors, and otherwise aided in setting up the corporation, applied to the court for leave to file an information in the nature of a *quo warranto* against the directors, to compel them to show by what authority they exercised their powers: it was held that this application should be rejected. Cole *v.* Dyer, 29 Georgia R. 434.

[14] Rex *v.* Clarke, 2 East, 75. But a judgment of ouster will conclude the party in any subsequent proceeding. Id.

confessed, a total defect of title in defendant, there is a judgment of ouster, or forfeiture.[15] And where it is intended to dissolve the corporation, judgment to that effect should be given in form.[15]

9. The relator is liable to costs if he fail, and is entitled to recover costs if he prevail ordinarily. But where the office is one where the party is compellable to serve, and is accepted and held in good faith, it is not common to allow costs against the incumbent upon judgment of ouster.[16]

10. In some of the states a process or proceeding under the name of "Quo Warranto" has been applied to test the question of corporate existence and power, on the ground of forfeiture of corporate rights by means of the omission to perform acts required by the charter, or of an excess of power having been resorted to, in either case in violation of granted powers and duties.[17]

11. And where the charter of a plank road company provides for the security of travel and for the enforcement of the duty of the company by suitable penalties, and the legislature, after the road was built and in use, imposed an entire forfeiture of the whole franchise of the corporation for failure to keep any portion of the road in repair, it was held to be such a modification of the charter as did not come within the proper exercise of the police power of the state, and therefore void as a violation of the contract in the grant of the charter.[18]

12. But where a turnpike charter provides penalties upon the company and its agents for neglecting to keep the road in good and perfect repair, such provision cannot be held to deprive the state of its sovereign power to annul a grant when its purposes have failed, through either the positive acts or neglect of the grantees; and when the fact of such act or neglect is duly established, the special remedy provided by the charter will be regarded as merely cumulative. It is of the very essence of a

[15] State *v.* Bradford Village, 32 Vt. R. 50; Rex *v.* Tyrrell, 11 Mod. 335.

[16] Rex *v.* Wallis, 5 T. R. 375; State *v.* Bradford Village, *supra.*

[17] Danville & W. L. Plank Road Co. *v.* The State, 16 Ind. R. 456. See also The People *v.* J. & M. Plank Road Co., 9 Mich. R. 285, where the extent of the remedy and the form of procedure is extensively discussed, but by a divided court.

[18] The People *v.* J. & M. Plank Road Co., 9 Mich. R. 285.

corporation, as a political existence or abstraction, that it should always be liable to dissolution by a surrender of its corporate franchises, and by a forfeiture of them, either by non-user or misuser.[19]

13. In a case where the statute directed the public prosecuting officers to take proceedings to determine whether the charter and franchises of a turnpike company had become forfeited by non-user or abuser, where no form of remedy is prescribed, it was held that *scire facias* was the proper one to be adopted, and all that is required to be set forth in the writ is enough to inform the company of the causes of complaint and the extent of redress sought.[19] This procedure is very much the same, in effect, as that by *quo warranto*, already discussed, except that it is in the form of a civil action.[19]

14. It is no excuse for a turnpike company not keeping its road in repair, that the state have chartered a railway along the same route, and thereby disabled the company from maintaining its road in the state of repair required by the charter.[19] Nor is it a bar to the proceedings that the company have applied all their tolls to the repair of the road.[19]

[19] Wash. & Balt. T. Road Co. *v.* The State, 19 Md. R. 239. The particular forms of the pleading, both on the part of the plaintiff and defendant, are here extensively discussed, as well as many questions in regard to the admissibility of evidence.

*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; 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]

[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 capi-

4. It has been held, that in a parish through which a railway 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 Chan-

tal has been subscribed and every share allotted. M'Dougal *v.* Jersey Imperial Hotel Co., 34 L. J., Ch. 28.

[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.

cery, 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]

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 irre-

[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 tenants for instance, parties to the bill. Robertson *v.* The Same, 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 railroad 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. R. 199.

[9] Taylor *v.* Salmon, 4 My. & Cr. 141; Mare *v.* Malachy, 1 My. & Cr. 559; Walworth *v.* Holt, 4 My. & Cr. 619 – 635.

mediable.[10] But the cases where courts of equity have interfered to prevent threatened mischief[11] and injury without reparation,[12]

[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., 11 Jur. N. S. 935.

[11] McArthur *v.* Kelly, 5 Ohio R. 139.

[12] Bonaparte *v.* Camden & Amboy Railw., 1 Baldwin, 221; Gardner *v.* Newburg, 2 Johns. Ch. 162; Stevens *v.* Buckman, 1 Johns. Ch. 318; Amelung *v.* Seekamp, 9 Gill & J. 468; Ross *v.* Paige, 6 Ohio R. 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 State, 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 it 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. R. 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. 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.

are very numerous in the American Reports of Chancery decisions.

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 railroad 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 R. 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 Sumner, 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 R. 353; Ramsdall *v.* Craighill, 9 Ohio R. 197; Walker *v.* Mad River Railw., 8 Ohio R. 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 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 R. 340.

*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 the * company gave notice to take a certain quantity of land, and subsequently proceeded to summon a jury to estimate a less quantity, 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]

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 higher than contracts, and, after great delay in proceeding on such notices, they will be considered as abandoned. And in King *v.* Wycombe Railw., 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

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 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 prelimi-

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.

[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. R. 18.

[3] Montgomery & West Point Railw. *v.* Walton, 14 Ala. R. 207.

nary 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 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]

[4] Deering *v.* York & Cumberland Railw., 31 Me. R. 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. R. 221.

[6] Bird *v.* W. & M. Railw., 8 Rich. Eq. 46. It was held in this case, that 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.* Southwestern 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.

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.*

§ 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, 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 en-

[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

joined 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]

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,

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., 9 Jur. N. S. 951. And see Edinburgh & Glasgow Railw. *v.* Campbell, in the House of Lords, 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. R. 131.

[2] Gordon *v.* Cheltenham & Great W. Union Railw., 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 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*, § 198.

[3] Attorney-General *v.* The Eastern Counties & Northern & Eastern Railw. Companies, 2 Railw. C. 823.

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 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

[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.

[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.

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 persons acting under enclosure, and other acts of parliament of a similar nature.[8]

[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., 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 regard 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., 7 Jur. N. S. 453.

[8] Dawson *v.* Paver, 4 Railw. C. 81.

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 subsequent 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 injunction 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]

[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 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 Northern Railw., 9 Jur. N. S. 951.

[3] South Staffordshire Railw. *v.* Hall, 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 Eng. L. & Eq. 59.

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 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]

[4] Walker *v.* The Eastern Counties Railw., 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., 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, 13 Eng. L. & Eq. 312; s. c. affirmed, 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, 17 Eng. L. & Eq. 555.

[5] *Ante*, § 81; Adams *v.* London and Blackwall Railw., 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 very recent and well-considered case, Chapman *v.* Mad R. & Lake Erie Railw., and Sandusky City & Indiana Railw., 6 Ohio St. 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

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 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.

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. R. 158.

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]

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

[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.

[1] Agar *v.* The Regent's Canal Co., Cooper, 77.

[2] The Mayor of King's Lynn *v.* Pemberton, 1 Swanst. 244.

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 *Elaon'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 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]

[3] Salmon *v.* Randall, 3 Mylne & Cr. 439.

[4] Blakemore *v.* The Glamorganshire Canal Navigation, 1 Myl. & K. 154; Gray *v.* The Liverpool & Bury Railw. Co., 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

* 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 interfere, because a railway company do not propose 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 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]

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, 7 Eng. L. & Eq. 283. See Reg. *v.* Eastern Counties Railw., 10 Ad. & Ell. 531; Cohen *v.* Wilkinson, 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.

[7] Graham *v.* Birkenhead, Lancashire, & Cheshire J. Railw., 2 Mac. & G. 146; 2 Hall & T. 450.

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 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]

[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 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.

[2] See Bailey *v.* Power Street Church, 6 Rhode Island R. 491.

[3] Brown *v.* Monmouthshire Railw. and Canal Co., 4 Eng. L. & Eq. 113. But

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]

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 (Feb. 1858). But a railroad 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., 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., 11 Jur. N. S. 935; s. c. 35 L. J. 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

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]

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 Railway, 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 and Bir. Railw., 2 De Gex & S. 537. See also Ill. Grand Trunk Railw. Co. *v.* Cook, 29 Ill. R. 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., 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, 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 impera-

* 5. In a case where the plaintiffs complained that the directors of the Victoria Park Company, and certain others, proprie-

tive 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., 30 Law Times, 10, it is held, that the

tors of * shares, had entered into speculating purchases of the property of the company, and a majority of the directors being

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 Equity Court of 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. R. 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. R. 548. In Nazro *v.* Merchants' Mutual Ins. Co., 14 Wisconsin R. 295, it is laid down that the capital stock of an incorporated company is a trust fund, the

bankrupts 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 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

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, 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, 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., on appeal, 7 Jur. N. S. 887. And see Burt *v.* British Nation Life Ins. Co., 5 Jur. N. S. 612; s. c. 25 L. J. Ch. 731, before the Lords Justices; Hutton *v.* Scarborough Cliff Hotel Co., 2 Drew & Sm. 514.

[7] Foss *v.* Harbottle, 2 Hare, 461; Thames Haven Dock and Railw. Co. *v.* Hall, 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 and C. Railw. *v.* Buller, 5 Railw. C. 211, where it is said, that if the directors refuse to comply with the 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.

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., 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. 28 L. J. Ch. 385; Hodginson *v.* National Live Stock Ins. Co., 5 Jur. N. S. 478; s. c. on Appeal, 5 Jur. N. S. 969. See also Robinson *v.* Smith, 3 Paige, 222. So, too, a director

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 although strictly the proceeding should be instituted in

is liable to account for premiums received upon the sale of shares. York and N. M. Railw. *v.* Hudson, 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. R. 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 Penn.), 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 Beavan, 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. R. 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.

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 it 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]

[9] Preston *v.* Grand Collier Dock Co., 2 Railw. C. 335; s. c. 11 Simons, 327; Wallworth *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., Beeman *v.* Rufford, 6 Eng. L. & Eq. 106; Hodges on Railways, 71.

[10] London & Birmingham, &c. Railw. *in re*, 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 Stockton (N. J.) Ch. 401; *ante*, § 20; March *v.* Eastern Railw., 40 N. H. R. 548; Nazro *v.* Merchants' Mutual Ins. Co., 14 Wisconsin R. 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 Indiana R. 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

10. And because no individual stockholder can maintain any action against the directors for defrauding the company, as the directors are liable only to the company for any misconduct at law, equity will interfere at the suit of any stockholder, and sustain a bill at his suit against the directors for misconduct in

may have an injunction 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., 7 Jur. N. S. 887.

In Phœnix Life Insurance Company *in re*, *ex parte* Burges & 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 Railw. 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. Id. 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 Vermont R. 1. In this case those having the control of railroads in Vermont were enabled by statute to lease them to companies owning other roads connecting with them at the line of the State. A railroad having in this manner been leased to the Troy & Boston Railroad Company, it was held that the want of authority in the Troy & Boston Railroad Company to take the lease could not be raised 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.

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.[13]

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.[14]

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.[15]

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.[16]

16. But a court of equity will not compel the directors of a corporation to declare dividends out of the surplus earnings of

[13] Allen *v.* Curtis, 26 Conn. R. 456.

[14] Rochester *v.* Barnes, 26 Barb. 657.

[15] Dodge *v.* Woolsey, 18 How. U. S. Sup. Ct. 331.

[16] 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.

the company, unless they are shown to have refused from a wilful abuse of their discretion.[17]

17. The directors are only liable for good faith and reasonable diligence.[17]

*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

[17] Smith *v.* Prattville Man. Co., 29 Ala. R. 503.

[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 for applying for increased powers to the legislature of their own, or, if necessary, a foreign country.

[2] Frederick *v.* Coxwell, 3 Y. & J. 514.

[3] Stevens *v.* South Devon Railw., 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.

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 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 embarrassment 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, 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.

[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., 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 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., 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

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

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. Pete *v.* Brighton, &c. Railw., 32 L. J. Ch. 677.

[3] Webster *v.* The Southeastern Railw., 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 special 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.

contract, or if it be not of a class where specific performance is usually decreed, the court will not interfere by injunction.[5]

6. A contract between two railways, that each shall run upon the track of 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

[5] Johnson *v.* Shrewsbury & B. Railw., 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 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 St. 544, it was held, that if the court could in any case decree specific performance of a contract to operate a railroad, requiring as it would the 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., 10 Eng. L. & Eq. 11.

[7] Storer *v.* Great Western Railw., 3 Railw. C. 106; *ante*, § 39.

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 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. R. 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. R. 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 passen-

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 definitively 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 recent very elaborate case,[4] this subject is discussed

gers, &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 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.

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 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]

[5] Newberg & 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. R. 40. And in s. c. 17 Conn. R. 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

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 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]

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 Sand. Ch. 625; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547.

[6] Illinois & Mich. Canal *v.* Chicago & Rock Island Railw., 14 Ill. R. 314.

[7] Commonwealth *v.* Pittsburgh & Connellsville Railw., 24 Penn. St. 159.

[8] 8 & 9 Vic. 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 intermedlers 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.

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.*

§ 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 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 circumstan-

[1] Attorney-General *v.* Sheffield Gas. Co., 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.

ces, 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 a bill to enjoin a party from the continuance of a public nuisance, under color of legislative grant.[5]

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

[3] North Union Railw. *v.* Bolton and Preston Railw., 3 Railw. C. 345; Semple *v.* London and B. Railw., 1 Railw. C. 120.

[4] 2 Gray, 1. See also upon this point, *ante*, § 214, n. 4. 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.

[5] Bigelow *v.* Hartford Bridge Co., 14 Conn. R. 565; O'Brien *v.* Norwich and Worcester Railw., 17 Conn. R. 372; Delaware and Maryland Railw. *v.* Stump, 8 Gill & J. 479.

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]

2. In the English equity practice, in some cases, in consideration of the consequent delay and inconvenience resulting from the 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]

[1] Shrewsbury and Chester Railw. *v.* The Shrewsbury and B. Railw., 4 Eng. L. & Eq. 171; 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, sec. 61, courts of equity are authorized, in cases where they deem a trial at law 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*, § 190.

[2] Northam Bridge and Roads *v.* The London and Southampton Railw., 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 June. Canal Co., Id. 224; Attorney-General *v.* The Eastern Counties Railw., 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

*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 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

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 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., 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.

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]

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]

[4] Clarence Railw. *v.* The Great N. of England, Clarence, & Hartlepool Railw., 2 Railw. C. 763. See also Attorney-General *v.* Manchester & Leeds Railw., 1 Railw. C. 436.

[1] Macon & Western Railw. *v.* Parker, 9 Georgia R. 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. 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]

*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

[2] Bruner *v.* Planters' Bank, 23 Miss. R. 406.

[3] Casey *v.* Cin. & Chi. R. Co., 5 Clarke, 357.

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 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.

[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 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.

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 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

[4] Bell *v.* The Hull & Selby Railw., 1 Railw. C. 636.

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 of facts, which turns 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]

[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.

[6] Greenhalgh *v.* M. & Birmingham Railw., 1 Railw. C. 68; Attorney-General *v.* The Mayor of Liverpool, 1 My. & Cr. 171, 210.

*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]

[1] *Ante*, § 198; Illingworth *v.* The Manchester & Leeds Railw., 2 Railw. C. 187; Semple *v.* The London & Birmingham Railw., 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, 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 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. 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."

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

[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., 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 held that an injunction should not be granted until all the ordinary means for obtaining an indemnity have failed.

[4] People *v.* Third Avenue Railw. Co., 45 Barb. 63.

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 inform the defendant of the precise limits of his right, and

[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 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.

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 any serious damage will ensue from non-interference.

5. The court here very distinctly repudiate the proposition maintained by the Master of the Rolls in the same case, when

[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., 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 & Brighton Railw., 1 Railw. C. 171.

[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, 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. R. 470.

[8] Durrell *v.* Pritchard, 12 Jur. N. S. 16 (1866).

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.

[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 refused to suspend the order until an appeal could be heard under the particular circumstances. The language of the learned judge is worth repeating: —

2. "Then comes the question, what, if anything, 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 or 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

[1] The Attorney-General *v.* The Great Northern Railw., 3 Eng. L. & Eq. 263; Attorney-General *v.* London & Southwestern Railw., 3 De G. & Smale, 439.

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; 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

[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 *bonâ 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.

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 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 not affected in the same manner with himself.[1]

[3] Catlin *v.* Harned, 3 Johns. Ch. 61. And in a recent English case, Stocker *v.* Wedderburn, 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 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., 5 Jur. N. S. 612.

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.*
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, 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 encumbrance, and is at the present time being so applied as not to be legally applicable to reduce the encumbrance.

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]

4. And it was said by Lord *Eldon*,[2] that it afforded no invin-

[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.

cible 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 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 is 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]

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 it, and when the party entitled to the estate is ascertained, the receiver will be his receiver.[5]

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 encumbrancer 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.[6] 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.[6] And the subsequent encumbrancer will not be obliged to refund any rents received by himself before the prior encumbrancers took possession or brought suit.[7]

[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] *Nelson*, J., in Wiswall *v.* Sampson, 14 How. 52, 65.

[6] Howell *v.* Ripley, 10 Paige, 43.

[7] Thomas *v.* Bugstocke, 4 Russ. 64.

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.[8] 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.[8]

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.[9]

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.[10] 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.[11] 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.[12]

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.[13] This principle is illustrated in a very recent case, where the receiver paid over

[8] Caggee *v.* Howard, 1 Barb. Ch. 368.

[9] Booth *v.* Clark, 16 How. 322; Porter *v.* Williams, 5 How. Pr. 441; s. c. 5 Seld. 142.

[10] 2 Redf. on Wills, 881, 882, and cases cited.

[11] Knight *v.* Lord Plimouth, 3 Atk. 489; Rowth *v.* Howell, 5 Vesey, 565.

[12] 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.

[13] Bodenham *v.* Hoskins, 21 Eng. L. & Eq. 643.

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.[14] And in the same case,[15] the Master of the Rolls said: "The receiver could not have received anything 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.[16]

[14] De Winton *v.* Mayor of Brecon, 8 Jur. N. S. 1046; s. c. 28 Beav. 200.

[15] Lane *v.* Stone, 9 Jur. N. S. 320.

[16] *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 nonfeasance.*
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]

[1] Reg. *v.* Rigby, 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, 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. R. 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. R. 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

The company may use the highways for making up their trains to a reasonable extent, if they do not abridge the rights of others

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 earlier 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 corpora-

having 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 * non-feasance. But the case of Reg. *v.* G. N. of England Railway settled that question upon elaborate argument and great consideration.[4]

tion 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 weight, though it might be that there would be some difficulty in enforcing the remedy.

"The proper mode of proceeding against a corporation, to enforce 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.

[3] Gahagar *v.* Boston & Lowell Railw., 1 Allen, 187.

[4] A railway will be restrained from carrying on other business beyond the

It was held that where the surveyors of highways object to a 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

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.

[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.

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. 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]

[7] The Queen *v.* Thorpe, 3 Railw. C. 33.

[8] London & North W. Railw. *v* Wetherall, 2 Eng. L. & Eq. 265.

[9] Wilson *v.* Rochester & Syracuse Railw., 16 Barb. 167.

[10] State *v.* Gilmore, 4 Foster, 461. 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

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.*

§ 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

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 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 look-out, 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. R. 551.

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 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]

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.[4] * 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.[5]

[2] Donnaher *v.* The State, 8 Sm. & Mar. 649; Moses *v.* Pittsburg, &c. Railw. 21 Ill. R. 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] Drake *v.* Hudson River Railw., 7 Barb. 508.

[5] 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.[6]

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.[7] 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.[8]

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.[8] Every erection in a navigable river, without legislative permission, which obstructs navigation, is a nuisance.[8] Soo, too, where a railway company, by a wrong construction of

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 tramways on which omnibuses of a peculiar construction plied for hire, and these tramways were dangerous and inconvenient to the public, as the wheels of vehicles skidded when crossing the tramway, and horses putting their feet upon it were startled, this was held to be a public nuisance, even though these tramways were for the public conveyance generally. Regina *v.* Train, 2 B. & S. 640.

[6] Parrot *v.* The C. H. & D. Railw., 3 Ohio St. 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., 491; s. c. 10 Cox, C. C. 6.

[7] Attorney-General *v.* Hudson River Railw., 1 Stockton (N. J.) Ch. 526.

[8] Newark Plank-Road Co. *v.* Elmer, 1 Stockton (N. J.) Ch. 754.

their act, locate their road where they are not authorized, it becomes a nuisance on every highway it touches in its illegal course.[9]

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.[10]

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 hand, and forcibly remove the obstacle. They should apply to the proper tribunal for a mandamus, or other appropriate remedy.[11]

*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

[9] 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.

[10] State *v.* Morris & Essex Railw., 1 Dutcher (N. J.), 437; s. c. 3 Zab. 360; State *v.* Vermont Central Railw., 27 Vt. R. 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.

[11] Ellis *v.* London & S. W. Railw., 2 H. & N. 424.

[1] 7 & 8 Geo. 4, ch. 29, § 53; Reg. *v.* Boulton, 17 Law J. (M. C.) 152; 3 Cox,

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]

*2. Under the English statute, against doing "anything 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

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 company 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

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.

street railways to an obstructed 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 railroad established by the legislature, and moving at the usual rate of speed of such wagons, but slower than horse railroad 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 railroad, if there is room to do so, although it is usual and much easier to drive such wagons with one wheel in the railroad 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 railroad, 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 railroad 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. R. 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 constructed. Reg. *v.* Bradford, 8 Cox, C. C. 309. And see Roberts *v.* Preston, 9 C. B. N. S. 208.

*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. 10. *Right of legislature to exempt company or stock from taxation.*
7. *Railways not generally held liable to taxation as a fixture under general laws.*
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. 31. *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. 4, 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

[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.

afford to pay for the use of the railway, as net profits, after deducting all 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 earn-

[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 a 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, 5 Jur. N. S. 464; s. c. in Exch. Cham. Id. 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, 9 Jur. N. S. 1102.

ings of one parish may be received at other points.[5] It is not what is received in each parish, but what is earned there, which may be increased by there being more traffic there, or by the yearly out-goings 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 per centage on the same capital, for tenant's profits and profits of trade.

3d. A per centage 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* of the rails, sleepers, &c., and that these were all the deductions properly to be made.[9]

[5] Reg. *v.* Holme Reservoir, 10 W. R. 734.

[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.

[7] Reg. *v.* London, Br. & South Coast Railw., 6 Railw. C. 440; 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.

[9] Reg. *v.* Grand J. Railw., 4 Q. B. 18; Reg. *v.* Great Western Railw., 6 Q.

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 taken into the account in estimating the ratable value of the latter company.[10]

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, 9 Jur. N. S. 623; Eastern Counties Railw. *v.* Great Amwell, 11 W. R. 394; s. c., *nom.* Reg. *v.* Eastern Counties Railw., 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., 6 Railw. C. 464–477. And see London & Northwestern Railw. *v.* Cannock, 9 L. T. N. S. 325; Great E. Railw. *v.* Haughley, 12 Jur. N. S. 596.

[10] Reg. *v.* Newmarket Railw., 25 Eng. L. & Eq. 138. But in Reg. *v.* Sherard,

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]

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. R. 64.

[12] In Indiana it is held that a railroad company should be taxed for its road as an entirety, including everything in any way used by the company in running or operating it. But the real estate owned by a railroad 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. R. 262. And see Whitney *v.* Madison, 23 Ind. R. 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" "to the collectors of the several towns, &c. through which the road shall

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

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. R. 163; State *v.* Illinois Central Railw., 27 Ill. R. 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 R. 434; Bristol *v.* Chicago & Aurora Railw., 15 Ill. R. 436.

In a recent case, in the Supreme Court of Vermont, Conn. & Pass. Rivers Railw. *v.* Cooper, 30 Vt. R. 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. R. 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 com-

of a * 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]

pany was transacted at one of the places where the secretary resided, and where 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 railroad 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. R. 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 R. 150.

[15] Providence & Worcester Railroad *v.* Wright, 2 Rhode Island R. 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. R. 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.

* 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]

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 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 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 Howard, 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. R. 138, maintaining the want of power, in a state legislature, to grant a perpetual ex-

[16] Mohawk and 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 Indiana R. 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

emption 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 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 its funds in property to be used for speculation or a direct profit, and not for the specific purposes contemplated by their charter and the objects pretended 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 and Piscataqua Railw. *v.* Harris, 21 Maine R. 533. But in Cumberland Marine Railw. Co. *v.* Portland, 37 Maine R. 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. R. 291, 296; Philadelphia, Wilmington, and Balt. 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 manufac-

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 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.

8. In Pennsylvania, in Lehigh Navigation Co. *v.* Northampton County,[21] 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,[22] 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 con-

turing 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 Indiana R. 150.

[18] State *v.* Branin, 3 Zabriskie, 484; Easton Bridge *v.* Northampton, 9 Barr, 415; State *v.* Bently, 3 Zabriskie, 532; State *v.* Danser, Id. 552; Great Barrington *v.* Berkshire County, 16 Pick. 572. But see Gordon *v.* Baltimore, 5 Gill, 231, 236, and 12 Gill & J. 117.

[19] Stein *v.* Mobile, 24 Alabama R. 591; Providence Bank *v.* Billings, 4 Peters (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] 8 Watts & Serg. 334.

[22] Railroad *v.* Berks County, *et vice versa*, 6 Barr, 70; s. c. 2 Am. Railw. C. 306.

venient * use of the road, are to be held exempt from taxation, as forming a part of the incorporeal estate of the corporation.[23]

9. But it was also said in this last case,[24] 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[25] 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.[26]

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 to the original purchasers of the road of the state, $183,000 discount, or less, 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

[23] See Carbon Iron Co. *v.* Carbon County, 39 Penn. St. 251.

[24] Railroad *v.* Berks County, *supra.*

[25] Vermont Central Railw. *v.* Burlington, 28 Vt. R. 193.

[26] 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.

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.[27]

12. The powers 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.[28]

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 of the right of eminent domain begins. Since the decision of the case of The People *v.* The Mayor of Brooklyn,[29] the courts seem very composedly to have sunk down into the quiet conviction that it is 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.[30]

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.[31]

[27] People *v.* Michigan Southern & Northern Indiana R., 4 Mich. R. 398.

[28] Hill *v.* Higdon, 5 Ohio St. 243.

[29] 4 N. Y. Rep. 420.

[30] Emery *v.* San Francisco Gas Co., 28 Cal. R. 345, and cases cited by the court.

[31] The doctrine above stated is more or less directly affirmed in Brewster *v.* Syracuse, 19 N. Y. R. 116, 118; N. I. Railw. Co. *v.* Connelly, 10 Ohio St. 162; Municipality No. 2 *v.* White, 9 Lou. Ann. 452; Mayor of Baltimore *v.* Green Mount Cemetery Co., 7 Md. R. 536; Nichols *v.* Bridgeport, 23 Conn. R. 206; State *v.* City of Newark, 3 Dutcher, 191. And in the case of Dorgan *v.* City of Boston, 12 Allen, not yet reported, 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 an-

SECTION II.

Legislative Exemption from Taxation.

1. *General nature of such exemptions 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, in principle. 1st. Where property is conveyed directly by the state, upon the express condition that it shall be forever 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

nouncement, 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.

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 Ins. Co. *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 anything 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 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

[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.

[4] State *v.* Mansfield, 3 New Jersey R. 510 ; Gardner *v.* State, 1 Id. 557 ; Worcester *v.* Western Railw., 4 Met. 564 ; Meeting-House Society in Lowell *v.*

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]

Lowell, 1 Met. 538; Lehigh Co. *v.* Northampton, 8 W. & S. 334; Rome Railway *v.* Rome, 14 Ga. R. 275; Railway *v.* Berks Co., 6 Barr, 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 R. 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. R. 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.* Pittsburgh, 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 "*forever* from the payment of all tonnage taxes, and all other taxes whatever," "except for school, city, county, borough, and township taxes," is

[12] Philadelphia, Wilm., & Balt. Railw. *v.* Bayless, 2 Gill, 355.

[13] 5 Law Reg. 623, decided in June, 1857. 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 St. 563. The same principle is maintained in Bank of Toledo *v.* City of Toledo, 1 Ohio St. 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 St. 578; Norwalk Plank-Road *v.* Same, Id. 586; Dodge *v.* Woolsey, 18 How. 331.

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 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 Circuit Court of 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]

[14] New York & Erie Railw. *v.* Sabin, 26 Penn. R. 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.

[16] Ohio Trust Company *v.* Debolt, 16 How. (U. S.) 416; Easton Bank *v.*

12. There is one class of exemptions from taxation prevailing 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

Commonwealth, 10 Barr, 442. Christ Church *v.* Philadelphia, 24 Howard (U. S.), 300. In Eversfield *v.* Mid-Sussex Railw., 5 Jur. N. S. 776, it was held by the Lords Justices, 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.

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 purposes of profit and gain, are exempt from taxation upon such property not 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.*
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.*

§ 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]

[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 St. 77; People *v.* Mayor of Brooklyn, 4 Comst. 419; Steubenville & Indiana Railw. *v.* Tr. of North Township, 1 Ohio St. 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. R. 475; Stein *v.* The City of Mobile, 24 Ala. R. 591; Covington & Lexington Railw. *v.* Kenton Co. Ct., 12 B. Monr. 144; Cass *v.* Dillon, 2 Ohio St. 607; Talbot *v.* Dent, 9 B. Monr. 526; Nichol *v.* Nashville, 9 Humph. 252; Ryder *v.* The Alton & Sangamon Railw., 13 Ill. R. 516; Justices of Clk. Co. Ct. *v.* P., W. & K. River Turnpike Co., 11 B. Monr. 145; New

And * subscriptions made by towns or cities, without any special

O., Op., & G. W. Railw. *v.* Succession of John McDonough, 8 Louis. Ann. 341; Strickland *v.* Mississippi Railw., cited in 21 Miss. R. 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 R. 166, and in State of Iowa *v.* The County of Wapello, 13 Iowa R. 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 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 many able jurists in this country have professed to perceive clearly the reasons for giving municipal corporations the power to become stockholders in railway 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 R. 609, where *Spalding*, 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 R. 166. Taylor *v.* Newbern, 2 Jones, Eq. (N. C.) 141; City of St. Louis *v.* Alexander, 23 Mo. R. 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 R. 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. 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 R. 611; Slack *v.* Maysville & Lexington Railw., 13 B. Monr. 1; Cass *v.* Dillon, 2 Ohio St. 607; Thompson *v.* Kelly, Id. 647.

In Fosdick *v.* Village of Perrysburg, 14 Ohio State, 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 railroads, 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

act of legislation, to the stock of railways, have been held valid if confirmed by subsequent legislative sanction.[2]

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 State, 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. R. 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

[2] Bridgeport *v.* Housatonic Railw., 15 Conn. R. 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 everything affecting their general wealth and business prosperity. Whereas, in truth, we are compelled to limit such interests at a point far short of this.

*2. It was held that the statute of the New York legislature, authorizing railway companies of that state to subscribe for

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 railroad 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 if the railroad 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 railroad 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 stipula-

Everything 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 to bring the matter into serious debate, certainly, until a larger experi-

stock in the Great Western Railway, Canada West, is constitutional.[3]

tion which the railroad 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 freeholders 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, *supra*. 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.

ence 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 increased five years more. By act of April 14, 1852, the name

[3] 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 of 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. Id.

3. And the lateral railway acts in Pennsylvania, by which every county in the state is authorized to make railways, and to

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 offered 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., belongs 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 railroad, 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

condemn land and other private property for the purpose, are held to be constitutional and valid,[4] 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.[5] And it was held by the Supreme Court of Ohio,

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, Illinois Supreme Court, not yet reported.

[4] Harvey *v.* Thomas, 10 Watts, 63; Harvey *v.* Lloyd, 3 Barr, 331; Schoenberger *v.* Mulhollan, 8 Barr, 134.

[5] 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 their credit to the Northern Railway. And this doctrine was afterwards sustained in the Court of Appeals. Starin *v.* Genoa, 23 N. Y. R. 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. R. 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. R. 474; Commonwealth *v.* Perkins, 43 Penn. St. 400.

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 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.[6]

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.[7] And bonds of the county, issued on

[6] 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 strict law. See also Treadwell *v.* Commissioners of Hancock County, 11 Ohio St. 183.

[7] Mercer County *v.* Pittsburg & Erie Railw., 27 Penn. St. 389. Wetumpka *v.* Winter, 29 Ala. R. 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 railroad 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 railroad company must take them at par.

such a subscription, were enjoined upon a bill in equity, at the suit of the county.[8]

[8] 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, etc.; and if the commissioners of 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 23d, 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 railroad 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 railroad 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 in mandamus at the relation of B, a *bonâ 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 St. 437, sustaining Hopple *v.* Brown Township, 13 Ohio St. 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. R. 395. And see State *v.* Commissioners of Hancock County, 12 Ohio St. 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 il-

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.[9] In the further discussion of this case before the courts,[10] 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 *bonâ 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.

legal vote, will not vitiate. Piatt *v.* People, 29 Ill. R. 54. And see Whittaker *v.* Johnson, 10 Iowa R. 161.

[9] City of Aurora *v.* West, 9 Ind. R. 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 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. R. 88.

[10] Same *v.* Same, 22 Ind. R. 88. See also Bartholomew Co. *v.* Bright, 18 Ind. R. 93.

*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 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 the 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

[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.

the essential franchises of a corporation.[2] And the rule obtains * 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]

[2] Dart. College *v.* Woodward, 4 Wheaton, 518; Bridge Proprietors *v.* Hoboken Co., 1 Wallace (U. S.), 116. And the same doctrine is maintained in the late 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. R. 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. R. 746; West River Bridge Company *v.* Dix, 16 Vt. R. 476; s. c. in error in the U. S. Sup. Court, 6 Howard, 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 upon 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 analagous 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 R. 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, etc., 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 Howard, 301, 326, 327, 332; Jameson *v.* Planters' and Merchants' Bank, 23 Alabama R. 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 in-

* 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

terest, 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. 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. R. 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 as a turnpike is no violation of its rights. White River Turnpike Co. *v.* Vermont Central Railw., 21 Vt. R. 590; Turnpike Co. *v.* Railw. Co., 10 Gill & Johnson, 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, Sup. Court, 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, dealing in exchange and stocks and constructing a railroad, and hence cannot be implied from the grant of such franchises to a corporation. McIntyre *v.* Ingraham, 35 Mississippi R. 25. And see Madison, &c. Plank-Road Co. *v.* Watertown & Portland Plank-Road Co., 7 Wisconsin R. 59.

[4] Charles River Bridge *v.* Warren Bridge, 11 Peters (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.

grant other charters to similar corporations, essentially interfering with the utility and profit of the former franchise or corporation.[5] And even the fact 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

[5] State *v.* Noyes, 47 Maine R. 189; Lafayette Plank-Road Co. *v.* New Albany & Salem Railw., 13 Ind. R. 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 by incorporating a second company, which the state itself largely manages and profits by to the injury of the first.

[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. R. 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 main-

the charter of a railway corporation that the state would not, within thirty 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]

tain 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*.

[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. R. 35; Enfield Bridge *v.* Hartford & N. H. Railw., 17 Conn. R. 40; Washington Bridge *v.* State, 18 Conn. R. 53; Mohawk Bridge Co. *v.* Utica & Sch. Railw., 6 Paige, 554; White R. T. Co. *v.* Vermont Cent. Railw., 21 Vt. R. 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 Barr, 331; Shoenberger *v.* Mulhollan, 8 Barr, 134; Thompson *v.* New York & H. Railw., 3 Sand. Ch. 625.

[10] West River Bridge *v.* Dix, 6 Howard, S. C. R. 507, 529; Pierce *v.* Somersworth, 10 N. H. R. 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. R. 745; West River Bridge *v.* Dix, 16 Vt. R. 446; State *v.* Noyes, 47 Maine R. 187.

5. But this subject has recently 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.[11]

[11] 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 beneficial. Of course neither the government nor the undertakers had any experience, and could not form an accurate or even approximate estimate of

* 6. It seems to be now regared as settled by the supreme national tribunal, that grants made by a state to use the waters 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

* navigable streams for purposes of manufactures, &c., are in their nature revocable, and that the granting of similar powers

benefit on this corporation? It is found in the same act, the whole is presented at once to the consideration of the corporators, to be accepted or rejected as a whole, and this would of course constitute a consideration in their minds in determining whether to accept or reject the charter. If it adds anything 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

to other * corporations for public purposes, is no infringement of the former grant.[12]

government, as far as it was in their power, intended to engage with the corporation that no other direct railroad between Boston and Lowell should be legally made, leaving them to guard themselves from unauthorized and illegal disturbance by the general laws in the course of the ordinary administration of justice. This is strengthened by the consideration, that, as their whole remuneration would depend upon tolls, uncertain in amount, it was intended that they should be to some extent secure against any authorized road taking the same travel and of course the same tolls. There is a provision in the close of this 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

[12] 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

that lands are granted, either in fee or upon any other tenure, that the uses of navigable streams and waters are regulated, the right to build over navigable waters, to erect bridges, turnpikes, and railroads, and other similar rights and privileges are granted and justified; of the necessity and convenience of all roads and other public works and improvements, of their fitness and the best 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

not proper to submit the question to the jury whether, without unreasonable expense or undue injury to the second grantee, it

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. R. 35; Livingston *v.* Van Ingen, 9 Johns. 507.

"In the case of Charles River Bridge *v.* Warren Bridge, both in this court 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

might not have so exercised the franchise as to have avoided the injury to the first grantee.[13] But such a view would seem at first

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 governments provision is made for an adequate compensation which recognizes the owner's right.

"Nor does it appear to us to make any difference whether the land or any other right or interest thus appropriated, be derived directly from the government or 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

[13] New York & Erie Railw. *v.* Young, 33 Penn. St. 175.

blush 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 frame-work and scaffolding used in the course of construction.[14]

* 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.[15]

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 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 railroad 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. R. 361.

[14] Memphis & Ohio Railw. *v.* Huks, 5 Sneed, 427.

[15] 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.

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* 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.[16] If the company accept a regrant of the railway, with enlarged powers, it is thereby estopped to deny the validity of the repealing act.[16] The pendency of judicial proceedings against the company does not suspend the exercise of the repealing power by the legislature.[16] Nor can it alter the nature of the contract growing out of the charter.[16]

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.

[16] 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 grant, an act, in its terms applicable to all railroads, will affect any railroad company whose charter does not contain an express limitation to the contrary. Bangor, Oldtown, & Milford Railw. *v.* Smith, 47 Maine R. 35. In State *v.* Noyes, 47 Maine R. 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. R. 240. And see Delaware Railw. *v.* Thorp, 1 Houston (Del.), 149; State *v.* Dawson, 16 Ind. R. 40; Atkinson *v.* Marietta & Cincinnati Railw., 15 Ohio St. 21; Lafayette Plank-Road Co. *v.* New Albany, &c. Railw., 13 Ind. R. 90; Matter of Kerr, 42 Barb. 119; People *v.* Kerr, 27 N. Y. Ct. Appeals, 188; Philadelphia & Reading Railw. *v.* Philadelphia, 47 Penn. St. 325; Milhau *v.* Sharp, 27 N. Y. Ct. Appeals, 611; Brooklyn City & Newtown Railw. *v.* Coney Island & Brooklyn Railw., 35 Barb. 364; Cincinnati & Spring Grove Avenue Street Railw. *v.* Cumminsville, 14 Ohio St. 523. Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. Ct. Appeals, 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 its subject to the exercise of this right whenever required by the public good. See also Akin *v.* Western Railw., 30 Barb. 305.

9. In a recent case in Louisiana,[17] where the plaintiffs' company * were incorporated in 1830, with the exclusive privilege

[17] 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 Lumsden *v.* City of Milwaukee, 6 Am. Law Reg. 157, it was recently decided, that, as by the 11th article of the 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 recent 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 valid-

of constructing and using a railway leading to and from the city of New Orleans, and to and from Lake Pontchartrain; and in

ity 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. In a late case in New Jersey, it appeared that in 1790 the legislature incorporated the complainants, and gave them power to build a bridge over the Hackensack River, and take tolls from man and beast passing over it, and by the same law enacted that it should not be lawful for any person whatever to build any other bridge over said river for a hundred years. In 1860, the legislature gave the defendants power to build a railway from Hoboken to Newark, with the necessary viaduct over the said river Hackensack. Under this act the defendants commenced to build a viaduct over the said river, which they described in their answer to the bill of complaint as a structure such as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam, not to be connected with the shore on either side of said river, except by a piece of timber under each rail, and in such a manner, as near as may be, as to make it impossible for man or beast to cross said river upon said structure, except in the cars of the defendants; that the only roadway between said shores and said structure would be two or more iron rails, two and a quarter inches wide, four and a half inches high, laid and fastened upon said timber, four feet ten inches asunder. On this state of facts the court held that the proposed structure was no bridge within the meaning of term as used in the complainants' charter, and that no structure over the Hackensack River which had not a footway for man or beast to pass upon was included in such meaning; and so that the complainants' franchise was not interfered with by the grant to the defendants. Bridge Co. *v.* Hoboken Land Improvement Co., 2 Beasley, 503. It was here admitted that the clause in complainants' charter, providing that it should not be lawful for any other person or persons to build a bridge over their river, was a valid contract, and within the constitutional protection, and that the proprietors of this bridge had the exclusive right of maintaining it, and taking tolls thereon. *Ib.* 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 railroad 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

1833 the New Orleans & Carrollton Railway was incorporated for the construction of a railway from New Orleans to Carroll-

by the Western railroad company on its ferry-boats, was not a violation of the rights 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.

The case of the Bridge Co. *v.* Hoboken Land Improvement Co., *supra*, was carried into the Supreme Court of the United States, 1 Wallace (U. S.), 116, 141, and the opinion of the chancellor and court of errors of the State of New Jersey, was fully maintained. Mr. Justice *Miller*, in delivering the opinion of the court after determining the question of jurisdiction, says: "We are next led, in the natural course of the investigation, to inquire if the contract of the state forbid the erection of such a structure as the defendants were authorized to erect, and which they proposed to erect, under the act of 1860.

"This question, upon which the decision of the whole case must turn, we approach with some degree of hesitation. It is now over seventy years since the contract was made. A period of time equal to three generations of the human race has elapsed. During that time the progress of the world in arts and science has been rapid. In no department of human enterprise have more radical changes been made than in that which relates to the transportation of persons and property from one point to another, including the means of crossing water-courses, large and small. The application of steam to these purposes, on water and on land, has produced a total revolution in the modes in which men and property are carried from one place to another. Perhaps the most remarkable invention of modern times, in the influence which it has had, and is yet to have, on the affairs of the world, as well as in its total change of all the elements on which land transportation formerly depended, is the railroad system. It is not strange, then, that when we are called to construe a statute relating to this class of subjects, passed before a steam-engine or a railroad was thought of, in its application to this modern system, we should be met by difficulties of the gravest character.

"On the one hand, we are told, that the structure proposed to be erected by the defendants is a bridge; simply that and nothing less: that such is the name by which it is now called, and that it is, therefore, within the literal terms of the act. On the other hand, it is denied that the structure is a bridge, even in the modern sense of that word, since it is urged that the word is never applied to such a structure without the use of the word railroad, prefixed or implied; and that it performs none of the functions of a real bridge as that term was understood in the year 1790.

"In all the departments of knowledge, it has been a constant source of perplexity to those who have attempted to reduce discoveries and inventions to scientific rules and classifications, that old terms, with well-defined meanings, have been applied so often to things totally new, either in their essence or in their combination. It is to avoid the danger of being misled by the use of a term well understood before, but which is a very poor representative of the new

ton; and in 1840 the Jefferson & Lake Pontchartrain Railway was incorporated for the construction of a railway from Carroll-

idea desired to be conveyed, that our modern science is enriched with so many terms compounded of Greek or Latin words or parts of words. It does not follow, when a newly invented or discovered thing is called by some familiar name, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. Matters most intimately connected with the present subject of our discussion may well illustrate this. The track on which the steam-cars transport the traveller or his property is called a road, sometimes, perhaps generally, a railroad. The term road is applied to it, no doubt, because in some sense it is used for the same purpose that roads had been used. But until the thing was made and seen, no imagination, even the most fertile, could have pictured it, from any use previously made of the word road. So we call the enclosure in which passengers travel upon a railroad a coach, but it is more like a house than a coach, and is less like a coach than several other vehicles which are rarely, if ever, called coaches. It does not therefore follow, that when a word was used in a statute or a contract seventy years since, it must be held to include everything to which the same word is applied at the present day. For instance, if a Philadelphia manufacturer had agreed with a company, seventy years ago, to furnish all the coaches which might be needed to transport passengers between that city and Baltimore for a hundred years, would he now be required by his contract to build railroad coaches? Or, if a company had then contracted with the government to build and keep up good and sufficient roads, to accommodate mails and passengers between those points, for the same time, would that company be bound to build railroads under that contract? Yet the structure which the defendants propose to build over the Hackensack is not more like a bridge of the olden time than a railroad is like one of its roads, or a railroad coach is like one of its coaches. It is not, therefore, a necessary inference, because the word bridge may now be applied, by common usage, to the structure of the defendants, that it was the thing intended by the act of 1790.

"Let us see what kind of structure the defendants proposed to build. It is an extension of the iron rails, which compose the material part of their road, over the Hackensack River, together with such substructure as is necessary to keep them in place, and enable them to support the cars which cross on them. There is no planked bottom, no roadway or path, nothing on which man, or beast, or vehicle can pass, save as it is carried over in the cars of the defendants. Was this kind of thing in the minds of the framers of the act of 1790, or of the commissioners who let out the contract? Or would the term, as then used by them, or by common usage, have included such a thing? We have no hesitation in answering both these questions in the negative. We are therefore quite clear that the adoption of that word to express the modern invention, does not bring it within the terms of the act, if it is not within the intent of it. We will inquire, therefore, for a moment, if it is within the spirit of the act and of the accompanying contract with the commissioners. There is no doubt that it was

ton to Lake Pontchartrain; and the two last-named companies entered into an arrangement, by which "through" trains were

the intention of those who framed these papers to confer on the persons now represented by the plaintiffs some exclusive privilege for the term of ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall perhaps be able to decide whether the erection proposed by the defendants will infringe it.

"In the first place, it is not an exclusive right to transport passengers and property over the Hackensack and Passaic Rivers, within the prescribed limits, for there is no prohibition of ferries, nor is it pretended that they would violate the contract. In the next place, it is not a monopoly of the right to build bridges within the prescribed limits, because they were only authorized to build one bridge over each river, and the statute expressly enacted that it was unlawful to build any other bridge by any person or persons, not excepting them. Besides, the building of the bridge was not the privilege, but the duty of those who had the contract; a duty which constituted the consideration for the privilege which was granted to them.

"The right to collect tolls of persons and things passing over their bridges is the privilege or franchise which they have; and that right is rendered valuable by the prohibition to build other bridges, within the limits designated. This prohibition of other bridges is so far a part of the contract, and only so far, as it is necessary to enable the plaintiffs to reap the benefits of their privilege to collect toll for the use of their bridges. The extent to which tolls may be levied by the bridge-owners, and the classes of persons and things on which they may be levied, are enumerated distinctly, and fixed by the contract. They may be summed up shortly as persons on foot, animals and vehicles passing over the bridge. If the proposed structure is essentially calculated to interfere with or impair the right of the plaintiffs to collect these tolls, we are unable to see it. No animal can pass over it on foot. No vehicle which can pass over the bridge of the plaintiffs can by any possibility pass over that of the defendants. No class of persons or things of which the plaintiffs can exact toll, can evade that toll by using the structure of the defendants.

"It may be said that passengers and property now transported by that railroad would be compelled to use the bridge of the plaintiffs if there were no such road and no such viaduct. This might be true to a very limited extent if plaintiffs could annihilate all railroads passing in the direction of the road which crosses the bridge. But this they are not permitted to do. And as to the road of the defendants, if they are not permitted to cross the Hackensack within the limits claimed by the plaintiffs, they can with more expense cross it somewhere else. That being done, it is not believed that the number of passengers or the amount of freight carried in wagons which would cross on the bridges of the plaintiffs, in consequence of this change in the location of the railroad viaduct, is appreciable.

"As the plaintiffs have no right to build any more bridges, and as the viaduct of the defendants does not harm that which is really their exclusive franchise,

run from New Orleans to the Lake, the plaintiffs asked for an injunction against the defendants; it was held, that the grant of

we do not perceive how the law authorizing such a structure can impair the obligation of the contract, made in 1790 by the state with the bridge-owners.

"These views are not without the support of adjudged cases, which, if not in all respects precisely such as the one before us, are sufficiently so to show that they were considered and entered largely into the reasoning on which the judgments of the courts were founded.

"In the Mohawk Bridge Co. *v.* Utica & Schenectady Railw., 6 Paige, 564, the plaintiffs claimed an exclusive franchise similar to that held by the plaintiffs in this case, which the defendants, as they alleged, were about to violate by erecting a structure for the use of a railway, over the same stream within the prescribed limits. The chancellor refused the injunction, upon the ground that the rights of the plaintiffs were not exclusive, which was at that time a very doubtful point in New York, and also upon the ground that the exclusive right to the toll-bridge would not be infringed by the erection of a railroad-bridge within the limits over which the exclusive right extended.

"In the case of Thompson *v.* New York & Harlem Railw., 3 Sandf. 625, where the contest was again between a bridge-owner claiming exclusive rights, and a railroad company, seeking to cross the stream within the limits of the plaintiffs' claim, the assistant vice-chancellor refers to the case above named, and says that he refuses the relief on both the grounds therein mentioned.

"The case of McKee *v.* Wilmington & Raleigh Railw., 2 Jones Law, 186, was an action at law, by the owner of a bridge who set up an exclusive franchise against a railroad company, whose track crossed the stream within the limits of his franchise, for a penalty allowed by statute for any violation of his right of toll. It is true that the court rests its decision mainly upon the ground, that, by the bill of rights of the State of North Carolina, no such right as that claimed by plaintiff can exist. But they argue very forcibly that a railroad bridge is no violation of a franchise for an ordinary toll-bridge, and intimate very strongly that they would so hold if the case required the decision of the point.

"The case of the Enfield Toll-Bridge Co. *v.* Hartford & New Haven Railw., 17 Conn. R. 56, has been cited by counsel and much relied on, as deciding the principle in question the other way. And perhaps a fair consideration of the case, and the line of argument of the learned judge who delivered the opinion, justifies counsel in claiming that it is in conflict with the views we have here expressed. In that case, however, it was found by special verdict, as one of the facts on which the opinion of the court was asked, that the defendants' road and bridge would to a certain extent diminish the tolls of the plaintiffs; a fact which is not found in the case before us, and which, as already shown, we cannot infer from its record. What influence this fact may have had in the minds of that court we cannot say. We are, however, satisfied that sound principle and the weight of authority are to be found on the side of the judgment rendered by the New Jersey Court of Errors and Appeals in this case; and accordingly that judgment is affirmed."

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,[18] the opinion by Mr. Justice *Nelson* seems to recognize 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,[19] 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.[20]

[18] Turnpike Co. *v.* The State of Maryland, 3 Wallace (U. S.), 210.

[19] 3 Wallace (U. S.), 51.

[20] 27 New York R. 87.

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[21] 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.[21]

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.[22] It is 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.[23]

[21] The Trenton City Bridge Co., 2 Beasley, 46.

[22] Bridge Co. *v.* Hoboken Land & Imp. Co., 2 Beasley, 81; s. c. 2 Beasley, 503; 1 Wallace (U. S.), 116; *supra*, n. 17.

[23] Taylor *v.* Brookman, 45 Barb. 106.

*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 railroad 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 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]

[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. R. 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. R. 131.

[2] In State *v.* Noyes, 47 Me. R. 189, it was held that private corporations,

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]

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 railroad, 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. R. 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. R. 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 '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.

* 3. There is an early case in Maryland,[4] where the legislature, by special statute, enabled the defendants to issue bonds for the

"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 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

[4] McCullogh *v.* A. & E. Railw., 4 Gill, 58.

* payment of their debts, providing that the interest should be paid out of a certain fund designated in the act for that purpose,

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 St. 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 everything 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. Sup. Ct. 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, which they may undoubtedly do (Moor *v.* Veasie, 32 Maine R. 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 per-

the * principal being irredeemable for thirty years, and it was provided that the amount of A's claim should be determined by

son, 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. R. 138; Mechanics' and Traders' Bank *v.* Debolt, 1 Ohio St. 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. R. 525, and in some of the other states, Landon *v.* Litchfield, 11 Conn. R. 251, and cases cited; O'Donnell *v.* Bayley, 24 Miss. R. 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 everything 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 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

B, and it was * held that it was not competent for the legislature to provide, by subsequent statute, for referring A's claim to other

'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. R. 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. R. 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

arbitrators * 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. R. 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. R. 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

*4. Under the usual legislative reservation of the power to alter, modify, or repeal the charter of a railway company, it has

business with them, or come upon their grounds, through their general statutes and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several 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. R. 745; West River Bridge Co. *v.* Dix, 16 Vt. R. 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

been * considered that the legislature cannot impose pecuniary burdens upon the company of a character different from any

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 important 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.

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others in the * charter, as requiring them to cause a proposed new street or highway to be taken across their track, and to

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 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 R. 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 cor-

cause the necessary * excavations, embankments, and other work to be done at their own expense.[5]

porations 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 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 R. 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

[5] Miller *v.* New York and Erie Railw., 21 Barb. 513. In Lee & Co.'s Bank, 21 N. Y. R. 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 nevertheless

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. R. 479. See also Conn. &. Pass. Railw. Co. *v.* Holton, 32 Vt. R. 43. And a clause giving to a railroad company the fee simple in the track and the sub-use and occupation of the same, and providing that no person or body politic or corporate should interfere therewith or do anything to detract from the profits of the company, will not exempt such company from the operations of the statute making railroad companies liable for cattle killed on their track. Indianapolis, &c. Railw. *v.* Kercheval, 16 Ind. R. 84. And see Judson *v.* N. Y., &c. Railw., 29 Conn. R. 434, 438, opinion of the court; Ohio, &c. Railw. *v.* McClelland, 25 Ill. R. 140; Grannahan *v.* Hannibal, &c. Railw., 30 Missouri R. 546. On the same principle it is said in Galena, &c. Railw. *v.* Dill, 22 Ill. R. 264, that an act exempting a railroad company from ringing a bell or sounding a whistle at a street crossing, is not unconstitutional. See also Veazie *v.* Mayo, 45 Maine R. 560; Bulkley *v.* New York, &c. Railw., 27 Conn. R. 479; New Albany, &c. Railw. *v.* Maiden, 12 Ind. R. 10; Indianapolis, &c. Railw. *v.* McAhren, 12 Ind. R. 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 side-walks and curb-stones in cities and towns has been imposed upon adjacent lots, chiefly for general comfort and convenience. Paxson *v.* Swett, 1 Green, 196; City of Lowell *v.* Hadley, 8 Met. 180. Matter of Dorrance street, 4 Rhode Island R. 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. R. 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, N. J. R. 714;

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]

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 do. 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 contract, in the charter of the corporation. Washington Bridge Co. *v.* State, 18 Conn. R. 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, etc. 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

[6] Peters *v.* Iron Mountain Railw., 23 Missouri R. 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. R. 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. R. 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 late case in the State of Michigan, where the charter of a railway contained an express stipulation that no other railway

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, etc., 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 action in cases of obstructions, which the company did not accept, and it was 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. R. 623. See also Roxbury *v.* Boston & Prov. Railw., 6 Cush. 424; Madison & Ind. Railw. *v.* Whiteneck, 8 Ind. R. 217.

In some recent 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 late case in Maine, it was held that an act, general in its terms, and applicable to all railroads, is, within the meaning of the act of 1831, ch. 503, empowering the legislature to modify the charters of corporations; and such act effects the charter of any railroad company which contains no express limitation 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 Maine R. 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 im-

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 apply 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

ply 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 Barr, 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 recent case in Maine, Norris *v.* Androscoggin Railw., 39 Maine R. 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 of the rights secured in its charter for regulating tolls on its road. Vermont & Mass. Railw. *v.* Fitchburg Railw., 9 Cush. 369.

See also Baker *v.* Boston, 12 Pick. 184, 194; Vanderbilt *v.* Adams, 7 Cowen, 349; State *v.* Kirkwood, 14 Iowa R. 162. *Ante*, § 78, pl. 4.

[7] Michigan Central Railw. *v.* Michigan Southern R., 4 Mich. R. 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.

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]

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

[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 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. R. 506. And see *Post*, § 233, c.

[9] English *v.* New Haven & Northampton Co., 32 Conn. R. 240.

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 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]

[10] N. E. & S. W. Alabama Railw. *ex parte*, 37 Alab. R. 679.

[11] Ind. &c. Railw. *v.* Kercheval, 16 Ind. R. 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. R. 356. See also Coosa River Steamboat Co. *v.* Barclay, 30 Alab. R. 120.

[13] Powell *v.* Sammons, 31 Alab. R. 552.

*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 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 re-locate 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

[1] Bradley *v.* New York and New Haven Railw., 21 Conn. R. 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 lately maintained in the supreme federal court. Rice *v.* Railway Co., 1 Black (U. S.), 358; Jefferson, &c. Bank *v.* Skelly, Id. 436.

[2] Moorhead *v.* Little Miami Railw., 17 Ohio R. 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.

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]

* 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

[3] Boston & Lowell Railw. *v.* Andover & Wilmington Railw., 5 Cush. 375. And a like principle of construction was adopted in the late case of Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. R. 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, though accommodating a different line of travel from that which naturally flowed to the bridge. 29 Conn. R. 210.

[4] Enfield Toll-Bridge Co. *v.* H. & N. H. Railw., 17 Conn. R. 454; Springfield *v.* Conn. River Railw., 4 Cush. 63; White R. T. Co. *v.* Vt. C. Railw., 21 Vt. R. 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.

[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.

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.*

§ 233 *a*. 1. The Constitution of the United States does not prohibit a discrimination between local freight and that which 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 provision 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]

[8] North London Railw. Co. *v.* Metropolitan Board of Works, 5 Jur. N. S. 1121.

[9] Illinois Grand Trunk Railw. Co. *v.* Cook, 29 Ill. R. 237.

[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.

SECTION V.

Opinion on the Constitutional Right of the States to tax Shares of Domestic Corporations held by Non-Residents.

I. *The requirements of the statute of* 1854 *involve great inequality and injustice, as matter of taxation. In principle, it must involve, if legal, the right of destroying the stock of non-residents, at the will of the legislature. For if the principle is legal, it may be extended, till it absorb the entire income of the stock. Hence some have attempted to* imply, *in every grant of a charter of incorporation, an* exemption *from taxation. But this is no more to be* inferred, *from such a grant, than from the grant of any other property, real or personal.*

1. *Corporations taxable for property, income, and faculty.*
2. *The capital stock or property of corporations clearly taxable to them.*
3. *Mr. Justice Wayne's exposition of the subject.*
4. *Three species of property taxable to the corporation:*
   1st. *Capital Stock.* 2d. *Property.* 3d. *Franchise.*
5. *Shares taxable only to the owners.*

II. *If, then, the corporation is taxable for its capital stock, why may it not be taxed for the portion represented by shares owned by non-residents?*

1. *It is certain this could not be done, as to a portion of the capital represented by the shares of the resident owners.*
2. *Taxation implies an equalization upon the same class of property throughout the district taxed.*
3. *It is, therefore, not competent to tax property of the same class, at different rates, in different portions of the district taxed.*

III. *But it may be urged that this rule does not extend to non-residents.*

1. *As to real estate, a different mode of appraisal, on account of the non-residence of the owner, will not render the tax void.*
2. *But non-resident citizens and aliens do not stand upon equal footing, as to taxation.*

IV. *The United States Constitution secures to non-resident citizens of any of the United States the right of equal taxation with the citizens resident within the state where the tax is levied.*

1. *The article in the old Confederation, compared with that in the present Constitution, upon this subject.*
2. *This article has always been regarded as having reference to acquiring and holding property in the several states by the citizens of other states.*
3. *This view was early adopted, when the subject was fresh in the minds of all, and while the framers of the Constitution were upon the bench and at the bar.*
4. *Two decisions of the Maryland Court of Appeals stated, wherein it is held to have chief reference to taxation.*
5. *The opinion of Mr. Justice Washington stated, wherein he held similar views.*
6. *Cases cited from the Court of Appeals in Virginia and Kentucky, holding similar views.*
7. *A case from Alabama, expressly deciding the very point, within the last few years, stated.*
8. *The course of decision is uniform in that direction, and there is nothing to oppose it.*

V. *This indemnity against unequal taxation, extends not only to the amount, but to the principle or the mode of its levy.*

1. *The security, in regard to taxation, being reasonable in degree, depends much upon its affecting all alike; and this security is more important to non-residents than to residents.*
2. *This applies with great force to the different corporate interests, both as to the corporation and the corporators.*
3. *Shares are only taxable to the owner, in the place of his domicile.*
4. *And it is not material where the corporation is located.*
5. *The shares have no* situs *except the domicile of the owner.*
6. *The title to the shares and to the capital stock entirely distinct.*
7. *The only subject, in regard to which the shares and the capital stock are regarded as identical, is that of* exemption from taxation.
8. *But this does not prove that both may not be taxed at once.*
9. *Double taxation, illegal, but taxing shares and capital stock, is not.*
10. *The corporation is taxable, at the place of its principal office, for its franchise and all its property, except real estate.*
11. *The injustice, or abuse, of taxation, in detail, will not render it void, but its vicious principle will.*
12. *The fact that the corporation is taxed for all its property and its franchise has no tendency to exempt its shares from taxation.*
13. *The objection, in principle, to a tax of this kind is, that it is a special imposition upon a limited class of property, easily destroyed.*

VI. Resumé *of points established.*

1. *That a non-resident cannot be taxed upon shares.*
2. *The United States Constitution secures equality of taxation to non-residents, both in amount and in principle.*
3. *This tax is, in reality, upon the shares of a non-resident, but, in form, against the corporation, upon an aliquot proportion of its stock, represented by the shares of non-residents.*
4. *Illustrations of the entire inadmissibility of this mode of taxation.*
5. *And it is no excuse, that, in consequence of the non-residence of the owners, no other mode is practicable.*
6. *It is, in substance, a levy of a tax, on account of* choses in action, *upon the debtor, because the creditor does not reside where any such levy can be made upon him.*

VII. *Conclusion. The tax is void for many reasons.*

1. *It is far more than the shares of residents are taxed for state tax.*
2. *Views of Angell and Ames upon the point.*
3. *It is not a tenancy in common, and if it were, it would be illegal to tax the share of one tenant higher than those of the others.*
4. *Such a right of taxation, subversive of liberty.*

VIII. *There can be no question in regard to relief in the Circuit Court of the United States.*

§ 233 *b*. 1. The following opinion in regard to the constitutional right of the States to tax shares in domestic corporations held by non-residents, showing the grounds upon which the statute of Vermont, imposing a special tax upon the railway

stock of non-resident citizens, must be regarded as invalid, having been substantially adopted by the decision of the United States Circuit Court for the Vermont District, in an opinion delivered by Mr. Justice *Smalley*, in which Mr. Justice *Nelson*, who was present during the argument, concurred, is deemed of sufficient importance to be here presented to the profession.

2. The following opinion has been prepared, at the request of the Vermont and Canada Railroad Company, with great care and study, and after the most attentive examination of the authorities, with the sincere desire of finding everything bearing upon the question. The points decided, and in some instances the views of the court, have been stated more at length than would otherwise have been requisite, in order to enable the reader to form a reliable opinion in regard to the justness of the conclusions, without the necessity of recurrence to the books, many of which are not easy of access in all places. The author is ready to give full assurance that every case is fairly stated, and that he has brought out everything which he found, where it appeared to him to have any legitimate bearing upon the question, whether in favor of or against his ultimate conclusion. In doing this, he has of necessity presented many views, not having any very decisive tendency to support his final result, and some having more or less bearing in an opposite direction. But he believes the result to which he comes is the only one consistent with established principles.

The question discussed in this opinion and argument, arises upon the following provision in a statute of the legislature of the State of Vermont, requiring "the treasurers of the several railroad corporations in the state, on or before the first day of August, annually to pay, as a tax, into the treasury of the state, *for the use of the people thereof*, one per cent on each and every share, which shall be owned by any person or persons, *residing without this state*," whenever the annual dividends of the company amount to six per cent or more upon the capital stock.

The question becomes important, in determining the course proper to be pursued by the Vermont and Canada Railway, the only one in the state whose annual dividends amount to six per cent. For if the statute is valid, the treasurer, as a loyal and dutiful citizen, and subject of the government of the state, de-

sires to perform his duty, according to its requirements. And on the other hand, if the enactment is such an infringement of the national Constitution, and such a disclaimer of that courtesy towards the citizens of other states of the Union, which the national Constitution secures, as to be wholly inoperative, and, in effect, constructive resistance against the principles of our national Union, although perpetrated in all the possible good faith which ignorance and misconstruction can afford, the treasurer desires to maintain his paramount allegiance to the principles of the national Constitution, and not become implicated in even that constructive disobedience to national allegiance, which his co-operation in carrying into effect such a statute would imply.

We have taken the liberty of italicizing one clause in the statute, which is so very unusual, as fairly to imply that the framers of the statute were not unconscious that the statute would be obnoxious to remonstrance, and might very naturally be regarded as not a little out of the ordinary course. For after having required this exaction to be paid, "as a tax into the treasury of the state," there could have remained no possible necessity of defining "its use," unless from a consciousness of the requirement being out of the common course. The framers of that statute could not have supposed that such a tax would be regarded as for any other use than that of the people of the state, after being paid into the treasury of the state, unless from its character they were apprehensive that some suspicious person might conjecture, or intimate, that the exaction was of such a description that it must be intended for some less legitimate purpose than "the use of the people" of the state. From the fact that no such explanation of the purpose of taxation is to be found in the frame of any of the statutes of the state, which are annually passed, imposing taxes for the support of government, we think it fair to conclude that this commentary, setting forth the purpose of the levy, did spring from a consciousness that the exaction was of a nature to provoke remonstrance on the part of those subjected to it, and to invite criticism from other quarters, perhaps, and hence this volunteer offer of a vindication of the thing in advance.

I. We shall first attempt to show that the apprehension of the illegality of this imposition exclusively upon non-resident shareholders, if any such existed in the mind of the framers of the

statute, was not without just foundation. We are not sure, indeed, that the framers of this statute comprehended fully the grounds of its illegality; but its one-sidedness, and extortionous character, stand out so prominently in its very terms,—"one per cent on each and every share which shall be owned by any person or persons, *residing without this state*,"—as clearly to imply great want of *equality* and *justice*. Else why make such a marked discrimination between the shares owned by residents and non-residents? And it must have been obvious to the framers of this statute, that if this exaction could be vindicated upon principle, it could equally, if carried up to the point of absorbing the entire dividends upon non-resident stockholders' shares.[1] This, it must have been well understood, could only be vindicated upon the single ground of the non-residence of the owners, a discrimination between citizens and aliens only to be justified upon the ground of some imperious necessity of public policy; and having no parallel in modern times, and in civilized states; but carrying us back at once, over centuries of advancing civilization, to a period, when a non-resident alien was regarded as a barbarian and an outlaw. But we shall recur to this point again. We will now examine the general subject of taxation, as applied to corporations.

1. Corporations, like natural persons, are liable to taxation, both upon their property and income; and also upon their faculty. The faculty of a corporation is its organic life, its corporate existence, by which it is enabled to carry on business; that which it derives from its charter of incorporation, its corporate franchise.

Hence it was at one time claimed, that the legislature having granted a corporate charter, without restriction or reservation, it could not impose such restriction, by way of taxation, since the power of taxation implied the power of destruction, as declared by Chief Justice Marshall,[2] and such a power would therefore be subversive of the grant, equivalent to a repeal, which is confessedly beyond the power of the legislature.[3] But this course of reasoning was very early declared to be fallacious by the courts, since there is no more exemption of corporate property, or fac-

[1] M'Culloch *v.* Maryland, 4 Wheaton, 316.

[2] M'Culloch *v.* Maryland, *supra*.

[3] Dartmouth College *v.* Woodward, 4 Wheaton, 518.

ulty, implied in this grant, than in the grant of any other property, real or personal, which has never been claimed by any one. It is inferring the non-existence of a power, from its possible abuse, which would go far to subvert all powers.[4] It has also been held that the states have the power to tax their own stocks, which is a grant and bought with a price.[5] And it has recently been held that the stocks of the United States, as a source of income, are taxable by the states even.[6]

2. There can be no question that the capital stock of corporations, or their property, both real and personal, is taxable to the corporation itself.[7]

3. The subject of the taxation of corporations is well discussed, and learnedly and carefully defined by Mr. Justice *Wayne*, in delivering the opinion of the court.[8] "The franchise is their corporate property, which, like any other property would be taxable, if a price had not been paid for it." . . . . "The capital stock is another property corporately associated for the purpose of banking, but in its parts is the individual property of the stockholders, in the proportion they may own them; and being their individual property they may be taxed for it, as they may for any other property they may own. A franchise for banking is, in every state in the Union, recognized as property. The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government."

4. We here find the clear recognition of three kinds of corporate property, taxable to the corporation, and the shares in the hands of the corporators distinctly defined, as a fourth species of corporate property, which is taxable only to the owners or holders.

1. The capital stock; 2. The corporate property; 3. The

[4] Portland Bank *v.* Apthorp, 12 Mass. R. 252; Providence Bank *v.* Billings, 4 Peters, 514.

[5] Champaign County Bank *v.* Smith, 7 Ohio St. 42.

[6] The People *v.* The Commissioners of Taxes, New York Court of Appeals, 10 Am. Law Reg. 81.

[7] Bank of Commonwealth *v.* Commissioners, 32 Barb. 509; Oswego Starch Factory *v.* Dollaway, 21 New York Court of Appeals, 449.

[8] Gordon *v.* The Appeal Tax Court, 3 How. (U. S.) 133.

franchise of the corporation; all of which is taxable to the corporation; and the shares in the capital stock, which is taxable only to the shareholders.

II. It may here naturally be inquired, if the capital stock is taxable to the corporation, why may not the proportion owned by non-residents be taxed separately to the corporation?

1. It is obvious this could not be done as to a portion only of the resident shareholders. The very idea of taxation, the very etymology of the term tax, or taxation, implies that it is an imposition, or levy, upon persons or property, in due course or order, treating all alike in the same district, and the same condition and circumstances. The burden of taxation must be equalized in this mode, in order to preserve its character. It is in any view, taking private property for public use, and it cannot be so taken, without an equivalent, both as to the government and the other citizens. It is not competent for the government to convert private property to public use, by way of taxation, and without compensation, any more than in any other mode.

2. It is true that government is supposed to render an equivalent for taxation, in the protection which it affords to personal rights, and to the rights of property. But this is not the only equivalent required in the idea of taxation. It is also indispensable that the imposition should be made ratably, that the burden may thus be equalized throughout the state or district upon which it is imposed. And if property is taken by mere arbitrary imposition, and without the *bonâ fide* purpose and attempt thus to equalize the burden, it is nothing less than the confiscation of the property. It becomes a decree or judgment, and being done, without any lawful jurisdiction, and without even the forms of judicial procedure, it is as absolutely void, as if the property of the citizen were taken for the support or transportation of the army or navy, and its munitions and *materiel* without equivalent, in time of war; or as if the right of way, for purposes of permanent inter-communication, in time of peace or war, were taken without compensation, which is expressly prohibited by the Constitution of the state.

3. Hence, although the whole capital stock of corporations is unquestionably taxable to the corporation, it is not competent to tax it unequally, and in parts only, with reference to the resi-

dence of the owners who do live within the state. It would not, therefore, in a general state tax, be competent to require a corporation to pay a tax of one per cent upon that portion of its capital stock owned in one county, and half of one per cent upon that owned in another county, and two per cent upon that owned in a third county, and none at all upon that which was owned in still another. And it would make no difference in this respect that the portion of the capital stock not taxed to the corporation was taxed to the owners of the shares constituting that proportion. It is indispensable to the character of legal taxation that it should make no discrimination, either in regard to persons or property, in the same condition. This is a principle so familiar to all lawyers as scarcely to require the citation of authority. It is of the very essence of taxation, and one of its indispensable elements, that it should be equalized by this ratable mode of imposition. We apprehend there will be no question in the minds of men anywhere that this must be true, as to the taxation of the capital stock of corporations, so far as the resident owners are concerned. We presume the legislature supposed this unequal mode of taxing the corporation justified, if at all, on the ground of non-residence of some shareholders.

III. And it may be urged that residents and non-residents are not in the same condition, and that therefore some discrimination, in regard to the mode of taxing the proportion of capital stock represented by their shares, may be justifiable.

1. In regard to property which is taxed to all owners, whether residing within the state or not, — as for instance real estate, — the fact that the detail of proceedings in making the appraisal of the property, or the levy of taxation, is varied, so as to meet the convenience of making such collections of non-residents, and which is rendered necessary or convenient in consequence of the non-residence of the owners, or anything of that merely formal character, and which is not intended to, and does not, in fact, make any unjust discrimination in regard to the amount of taxation against non-residents, will not affect the legality of the tax.[9]

2. But it may have been supposed that non-residents and

[9] Redd *v.* St. Francis County, 17 Ark. R. 416.

aliens stand upon the same footing, in regard to taxation of their property interests within the state. This is, we think, a not uncommon misapprehension; but it is, nevertheless, a real misapprehension. In regard to aliens non-resident, there is no question the state may, if it deem such a course proper and creditable, provide that they shall not hold any property, either real or personal, within the state. It may, as already intimated, treat all non-resident aliens as barbarians and outlaws, if it so elect, as was formerly done, even in civilized states, and is still practised in some half-civilized countries. It is upon this ground that a tax payable upon all legacies due to non-resident aliens was held constitutional and valid.[10] Mr. Chief Justice *Taney* there said: "Every state or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee; and it may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state." So also if the state may prohibit the alien from holding property within the state, whether in corporations or not, as it most unquestionably may, it must be allowed to affix such conditions to the tenure as it may deem prudent and reasonable, either by way of taxation or otherwise. As is said in the last case named: "If a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy." Here "the right to take is given to the alien, subject to a deduction of ten per cent for the use of the state."

IV. But it is settled, by a long course of judicial decisions, that it is not competent for the legislature of one of the American states to make any such discrimination in regard to the citizens of the other states in the Union.

1. The 4th article, § 2, of the United States Constitution was expressly aimed against all such abuses. This section provides: "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." The confederation which preceded the Constitution contained a similar article, more in detail, concluding: "And the people in each

[10] Mager *v.* Grima, 8 How. (U. S.) 490.

state shall, in every other, enjoy all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively." The article in the present Constitution is condensed, very much at the expense of its perspicuity. If it had been left as it originally stood, with ten words more, it would have been perfectly obvious it had principal reference to placing the citizens of the Union upon equal footing, in regard to taxation, throughout the whole country, and to prohibit those invidious discriminations, which, as we have seen, sometimes prevail in regard to non-residents and aliens. But as the present article supplies the place of the former one, and does not vary the provisions, except by making its terms more general and less specific, it would be impossible to suppose it could have been intended to cover any other subject, much less to exclude that which it had formerly embraced.

2. Hence this article in the present Constitution has always been held to give the citizens of all the states the same rights in every other state, as to holding and enjoying property, which the citizens of that state have.[11]

3. Early in the history of the jurisprudence of the country, while the subject was fresh in the minds of the people, and the discussions consequent upon the adoption of the instrument were in the minds of all, and while many who had participated actively in the preparation or in the adoption of it held places, either upon the bench of the national or state judiciary or else at the bar, this section received repeated considerations and constructions, by different tribunals of the highest credit; and these have been repeated, at short intervals, until the present time.

4. In the Maryland Court of Appeals,[12] a question arose in regard to the right of issuing process of attachment against non-residents only. The true extent and construction of this article of the Constitution was the turning point in the case, and it was argued most elaborately and with the greatest learning and ability. In giving judgment, the court said this provision in the United States Constitution had reference to the right of acquiring and holding property, and its beneficial enjoyment in the

[11] Story on the Const. § 1806; Abbott *v.* Bayley, 6 Pick. 92; Corfield *v.* Coryell, 4 Wash. C. C. R. 371.

[12] Campbell *v.* Morris, 3 Harris & McHenry, 535 (1797).

several states, by the citizens of any of the other states. "And that such property shall be protected and secured by the laws of the state in the same manner the property of the citizens is protected. It means such property shall not be liable to any taxes or burdens which the property of the citizen is not subject to." And in another case before the same court (1799), the same subject is again very carefully re-examined, and the same views re-affirmed.[13] The court, in defining the extent of this provision in the national Constitution, say: It guarantees "that the citizens of all the states shall have and enjoy the peculiar advantages of acquiring and holding real as well as personal property, and that the same shall be protected and secured by the laws of the state in the same manner the property of the citizens is protected. That it shall not be liable to any taxes or burdens which the property of the citizen is not subject to, and on the same footing in the payment of the debts of deceased debtors with creditors living in the state."

5. Mr. Justice *Washington*,[14] in defining the true limits and proper construction of this provision, says: It must have reference to such "privileges and immunities" as are "fundamental" in their character, such as acquiring and enjoying property. "And an exemption from higher taxes and impositions than are paid by the other citizens of the state": *i. e.* that residents and non-residents, when they are citizens of the United States, and by consequence citizens of each particular state, shall only be subject to the same taxes upon the same class of property. These, adds the learned judge, are among "the particular privileges and immunities that are clearly embraced" in the provision.

6. The Court of Appeals in Virginia took a similar view of this provision.[15] So also in the State of Kentucky.[16] And in Sergeant's Constitutional Law, p. 329, the learned author takes the same view of this provision in the Constitution of the United States, as being clearly established, both by judicial construction and general acquiescence. The commentaries of this learned jurist upon American constitutional law have in themselves almost the weight of judicial authority.

[13] Ward *v.* Morris, 4 Harris & McHenry, 330, 340.

[14] Corfield *v.* Coryell, *supra*.

[15] Murray *v.* McCarty, 2 Munf. 393, 398.

[16] Amy *v.* Smith, 1 Litt. 326; Commonwealth *v.* Griffin, 3 B. Mon. 211.

7. In Alabama,[17] it is expressly decided that a statute taxing slaves of non-residents higher (in this case twice as high) as those of resident citizens, is contrary to the provisions of the United States Constitution, and void for the excess. The court query, in this case, whether some discrimination may not be made in such cases, upon the ground of police, but are clear it cannot be done as matter of taxation; nor can an imposition for purposes of taxation merely be supported by referring it to the police powers of the state. The proceeding must be in good faith, and imposed for the purposes professed; and if vindicated at all, it must be done upon the grounds of its adoption, and not by way of evasion. There is a very obvious distinction between taxation and the police power of the state. And it is easy to determine the primary and leading purpose of a levy upon property; and whether that is revenue, or the correction of evil habits and practices, and the maintenance of order and good government in the state. In short, whether the matter of revenue is the main thing looked after, or is merely incidental and accidental, and the main purpose and design of making the imposition, is corrective and punitive. But we have no apprehension it will be claimed that this tax was imposed to compel non-resident shareholders to sell their stock, although it may have that tendency.

8. It will thus be obvious, we apprehend, that the force of this provision in the national Constitution is settled by a uniform course of decision from near the date of its adoption to the pres ent time, and that there is no conflict of opinion among courts or jurists in regard to it. We must therefore conclude that all persons who are citizens of any one of the United States, and own property in any other state, are entitled to precisely the same protection in regard to taxation, as well as in every other respect, as if they resided within the state where the property is situated.

V. It is unquestionable, we think, that this indemnity extends not only to the amount of taxation, but to the principle or mode of its levy.

1. It is the principle of taxation which is often more important than the amount. For if we admit that the legislature may

[17] Wiley *v.* Parmer, 14 Alabama R. 627.

adopt a different mode of taxing the property of non-resident citizens from that which they apply to residents, there is far more danger of its abuse than in regard to residents, since the latter are represented in the legislature, and are really its constituents, and are only taxing themselves through their representatives. There is, therefore, no great danger that any course of taxation as applied to resident citizens would be likely to be carried to any destructive extent. But in regard to non-residents, if the principle and mode of levy was entirely different from that which was made to operate upon the resident citizens, and consequently could create no resistance or remonstrance from any one within the state or represented in the legislature, even when carried to the most destructive limit, as to the property of non-residents, it will be apparent that the necessity of subjecting all persons, resident or non-resident, to the same principle of taxation, is more indispensable to the fair protection of non-residents than of residents even. And we have already seen that the residents of every section of the state or district upon which the tax is levied are entitled to insist that it shall be levied in the same mode upon all property of the same class. Much more, then, is this true of the property of non-resident citizens.

2. But this applies with great force to the different interests in corporate property, and especially to the shareholders. The interest of a shareholder is personal to the owner, and is taxable to the owner, as matter of income, in the place of his domicile, and nowhere else. The interest or right of a shareholder in a corporation is well defined by *Shaw*, Ch. J.[18] "The right is, strictly speaking, the right to participate, in a certain proportion, in the immunities and benefits of the corporation." This is a right or property, as distinct from the capital stock of the company, or property of the company, as a debt is distinct from the debtor, or the mortgage debt from the mortgaged premises. The debt, whether secured by mortgage or not, and although it may fully equal and thus represent all the property of the debtor, is nevertheless liable to be taxed to the creditor, notwithstanding all the property which it represents, and which forms the entire basis of its security, may also have been taxed

[18] Fisher *v.* The Essex Bank, 5 Gray, 373.

to the debtor. And this is, in no just sense, double taxation. And the same thing would be equally true, although the debt existed only against property, either real or personal, no debtor being bound personally for its payment. For one thousand dollars of property, or money, there may be ten notes or bills, as between the successive owners through whom the title may have passed, each one of which, as a source of income, is taxable to the holder, and the property also taxable to the ultimate purchaser.

3. But, as we have already said, as to shareholders' interests, and all choses in action, they are personal to the creditor, and only taxable in the place of his domicile. The creditor cannot be taxed in the place of the domicile of the debtor unless he resides there, nor can the debtor be taxed for the debt, and allowed to deduct the tax from the debt. Nor can a tax against the creditor be imposed upon the property which is pledged or mortgaged to secure a debt, and thus made to apply towards the payment of the debt. The legislature has no power to tax choses in action held by non-residents. They are altogether beyond their jurisdiction.[19] The case last referred to decides that non-resident shareholders cannot be taxed for their shares. And it is well said here, by an able and experienced judge, that the attempt to do it "tends to weaken the bonds of the Union, by discouraging commercial intercourse and commercial relations."

4. And it is not important to the right of taxation, on account of income derivable from choses in action, that the debtors should reside within the state, or that the debt is dependent alone upon property situate without the state.[20] And so the resident owner of shares in a foreign corporation may be taxed in the place of his domicile on account of it, notwithstanding any tax the corporation may be subjected to in the state where it exists, whether it be a tax upon its business or franchise, or upon its capital or property.[21]

[19] Richmond *v.* Daniel, 14 Grattan, 385; State *v.* Ross, 3 Zab. 517.

[20] People *v.* The Commissioners, 33 Barb. 116.

[21] State *v.* Branin, *supra*. See also The Tax Cases, 12 Gill & Johns. 117; The Heirs of Deming *v.* Selectmen of Burlington, Sup. Ct. Vt. in Chit. Co., 1836, not reported, *Phelps*, J.; State *v.* Manchester, 1 Dutcher, 531, where it is held that bonds secured by mortgage upon lands in another state are taxable to the holders, notwithstanding the lands are taxed where situated.

5. The *situs* of the shares in a corporation, for purposes of taxation, and indeed for most, if not for all purposes, is that of the domicile of the owner. In the City of Evansville *v.* Hall,[22] it is said that the *situs* of the shares of an insurance company, at least for purposes of taxation, is the domicile of the owner. And although the Indiana cases seem to treat the shares and the capital stock as nearly identical, which, as we shall soon see, is a fallacy, yet even there, a statute imposing a tax upon the "stock" of railways was construed to import the property of the corporation.[23]

6. It may be well to state here, that, notwithstanding the control of corporations is dependent upon the ownership of the shares, the *title* of the shares and the *title* to the property of the corporation, which represents the capital stock with which it is purchased, is entirely distinct.[24] And there is no case, or class of cases, of any authority, wherein the shares and the capital stock or property of the corporation are held to be identical, or substantially so, except:

7. In regard to *exemptions* of corporations from taxation. It is now well settled, after a good deal of debate and some conflict of decision, that an exemption from taxation of a corporation, which is contemporaneous with its charter, whether it is procured by the payment of a bonus, or is merely gratuitous on the part of the state, if it form one of the conditions of the grant, thereby becomes perpetually binding upon the state, and irrepealable.[25] In this case the bank paid a bonus to obtain its charter, and the charter contained a stipulation "not to impose any further tax or burden upon them during the continuance of their charter." This was held to exempt the stockholders from all taxation on account of their shares in the capital stock. This was a very just and proper construction of such an exemption from taxation. For although in strictness it was giving the exemption an extension beyond the fair import of the words used, it no doubt met the purpose and intent of the parties to the con-

[22] 14 Ind. R. 27.

[23] Floyd Co. Auditor *v.* New Albany & Salem Railw., 11 Ind. R. 570; Connell *v.* Connersville, 15 Ind. R. 150.

[24] Wheelock *v.* Moulton, 15 Vt. R. 519.

[25] Gordon *v.* The Appeal Tax Court, 3 How. (U. S.) 133.

tract more fully than any other. And as it is not common to tax the corporation for its property or franchise, and at the same time tax the shareholders; if such an exemption from taxation was not held to extend to both, it would prove of no practical avail to the grantees; since all the tax which is ordinarily levied upon both might still be levied upon the shareholders, and thus the exemption be rendered futile. Hence the cases have finally adopted this view.[26]

8. We see no ground to question this construction of an exemption from taxation in order to make it carry that beneficial interest to the grantee which it was intended to give. But when it is attempted to argue that any tax imposed upon any more than one of these forms of corporate property is double taxation, and therefore void on that account, it is carrying the proposition further than either principle or authority will warrant. And hence, when it is said that "the stock of a bank being the representation of its whole property, when the shares have been taxed to the owners, the real and personal estate of the bank becomes exempt from taxation; to tax both its real and personal estate and its stock would be double taxation, and therefore illegal and unjust";[27] there is such a want of clearness in the legal propositions involved, and they are so mixed and complicated, that one scarcely knows whether to admit or deny them.[28]

9. As we have already said, there is no more double taxation

[26] There are many cases of credit which maintain the want of power in the legislature to exempt corporations or property perpetually from taxation. Debolt *v.* Ohio Ins. & Trust Co., 1 Ohio St. 563; Knoup *v.* Piqua Bank, Id. 603; Canal Commissioners *v.* Penn. Railw., 5 Law Reg. 623; Brewster *v.* Hough, 10 New H. R. 138; State Bank of Ohio *v.* Knoop, 16 How. (U. S.) 369; Woolsey *v.* Dodge, 6 McLean, 142; Alleghany County *v.* Shoenbergher, 1 Grant's Cases, 35; Johnson *v.* Conner, 7 Dana, 342; Tax Cases, 12 Gill & J. 117; Gordon's Ex'rs *v.* Baltimore, 5 Gill, 236; Smith *v.* Burley, 9 New H. R. 423; State *v.* Powers, 4 Zab. 400; Eastern Bank *v.* Commonwealth, 10 Barr, 442. And in Smith *v.* Exeter, 37 New H. R. 556, it was held that the taxation of the corporation for its property was equivalent to taxing the shares, upon the question of subjecting the owner to a tax on account of his shares, unless they had been already taxed.

[27] Gordon, Ex'r, *v.* Baltimore, 5 Gill, 236.

[28] Smith *v.* Burley, 9 New H. R. 423; Bank of Cape Fear *v.* Edwards, 5 Ired. 516.

in taxing the corporation, and at the same time taxing the shares to the holders, than in taxing the mortgagee for the mortgage debt, and at the same time taxing the land by which it is secured to the debtor. There is undoubtedly a kind of injustice in taxing the property, or stock of a corporation to the corporation, and at the same time taxing the corporators, for their shares in the corporate stock. It is, in an equitable light, much the same thing as taxing a copartnership for all its property and business, and at the same time taxing the separate partners for their shares in the capital stock. But in strict legal principle it is different, because the corporation is a distinct legal person from any or all the corporators, and as such is, in strict legal right, liable to taxation for all its property, for its faculty and for income, the same as a natural person.

10. The result of this is that the corporation may be made taxable at the place of its residence, or principal office, for its faculty or franchise; for its income, and all its choses in action, as well as its personal property in possession; but this is not common. And for real estate it is taxable at the place where the estate is situated.[29] And the same principle has been applied to a corporation extending into different states.[30] But as we have often before said, the taxable quality of the shares arises solely from the supposed income arising therefrom, and has no reference whatever to the estate of the corporation, but solely to the domicile of the holder or owner, and is taxable to the owner in the place of his domicile, without reference to any tax imposed upon the corporation, its property, or capital. And the fact that there is injustice in taxing both will not affect its legality, if the principle of the tax is legal and the intent is clear. For all taxation may be carried to the extent of becoming unjust, without becoming illegal, so long as it preserves the proper principle of taxation.

11. So that neither the injustice or the unusual character of taxation will avoid its legal binding force. It must be vicious in

[29] Salem Iron-Factory Co. *v.* Danvers, 10 Mass. R. 514; Amesbury W. & C. Man. Co. *v.* Amesbury, 17 Mass. R. 461; 4 Met. 184; 3 Greenl. 133; 9 Met. 199.

[30] Easton Bridge Co. *v.* The County, 9 Barr, 415.

principle, and thus virtually lose its character of taxation, in order to become invalid. In State *v*. Branin, *supra*, it is said, — "The stock of an incorporated bank, although the bank pays a tax upon its capital, may be taxed in the hands of stockholders, if authorized by the legislature, although it is a second tax upon the same property." . . . . "Double taxation may be unequal, oppressive, and unjust, but it is not prohibited by any constitutional provision, and it is in the discretion of the legislature, and courts cannot declare such a statute void, because it may be unjust or oppressive." [31] The reasoning of the court here is entirely sound, except that they give the character of the case a wrong appellation. It is not strictly double taxation. For if it were it would be illegal. The legislature can no more tax the same property twice, for the same thing, than it can tax it twice as much as other property of the same description. This is self-evident, and requires no proof. For instance, the capital stock of a corporation is all invested in property, so that its capital and property become identical. No one will admit for a moment that the legislature could tax both for the same thing. But they may unquestionably tax the corporation and the shareholders at the same time for the same general tax, and it is not double taxation in any just sense.

12. Hence, if we admit that the tax required to be paid by this statute is really a tax upon the capital of the railways, or a portion of it, it will not exempt the shares from taxation to the owner, let him reside where he may; and it is therefore strictly a tax in addition to that which is imposed upon resident owners. For the tax upon the owner of shares in the place of his domicile is not legally affected by any tax imposed upon the corporation, whether it be a domestic or foreign corporation.[32] And when the other statutes of the State of Vermont make the liability of the holder of shares in foreign corporations to taxation dependent upon the fact that such stock is not taxed to the corporation, it is matter of indulgence merely, and nothing which the owner of the shares could insist upon as matter of exemption from taxation, independent of the statute. Neither can the owners of

[31] See also The State *v*. Newark, 1 Dutcher, 315.

[32] State *v*. Manchester, *supra*.

Vermont railway stock, residing abroad, claim exemption from taxation on account of it, at the place of their domicile, because of paying this tax in Vermont.

13. The great objection, in principle, to a tax of this kind is, that it is a special imposition upon the property interests of non-residents, and not a tax upon such property in common with the other property in the state of a similar character. And if this principle is defensible, it gives the legislature the power to annihilate the property, at any moment, without in any way affecting the property of resident citizens, so that the destruction of this class of property, or its essential destruction by way of taxation, is a thing not of improbable occurrence if this mode of taxation be legal; while if it were taxed in common with all similar property in the state, it is scarcely supposable that any such thing could occur. It is this principle of taxation against which the decisions of the National Supreme Court, as to the U. S. Bank and U. S. Stocks have been directed.[33]

VI. We have thus shown, we think, very conclusively,

1. That a non-resident cannot be taxed in Vermont upon shares he may own in a corporation in Vermont any more than he could if the corporation were in the place of his domicile; the right to tax in such case being, as for a chose in action, which is the source of income, and this being altogether independent of the locality of the ultimate power or force producing the income, and having no *situs* except that of the domicile of the owner.

2. That the United States Constitution secures to all citizens of the United States equality of taxation with resident citizens, both as to the amount and the mode, or principle of its levy, whenever they may own property in the state.

3. That this statute, while it is in reality an attempt to compel non-resident shareholders to pay a tax upon their shares in the State of Vermont, when such property is in fact taxable nowhere else but in the place of the domicile of the owner or holder, assumes the form of a levy upon the corporation as to that portion of its capital stock only which is held by non-residents.

4. This is entirely inadmissible. The state might as well tax

[33] McCulloch *v.* Maryland, *supra;* Osborn *v.* Bank of U. S., *infra;* Weston *v.* Charleston, 2 Pet. (U. S.) 449.

the holders of shares in one county, and tax the corporation for the proportion of their stock held by the inhabitants of another county, when the tax itself extended throughout the state. The very principle of taxation, as we have said, requires that the levy be uniform upon all property of the same class. The state cannot therefore levy a tax of one per cent upon half the capital stock of a corporation, and a less or larger amount, or none at all, upon the other half. It might just as well be required that neat cattle upon one side of a river or highway should be taxed twice as much as upon the other side. The very principle of all taxation secures entire uniformity to the extent that the same class of property shall be taxed in the same mode throughout the district upon which the tax is levied. And where the Constitution of the state provided "*that the rule of taxation shall be uniform*, and taxes shall be levied upon such property as the legislature shall prescribe," it was held[34] that a statute imposing a tax of *one per cent* upon the capital stock of plank-road companies, and requiring them to pay the same into the treasury of the state, *in lieu of all other taxes*, was in conflict with this provision of the Constitution, and void. But this constitutional provision in Wisconsin only placed all property upon the same basis which the principle of taxation does each particular class of property everywhere. The case is therefore precisely in point.

5. And it is no excuse for this irregular mode of levy, that the owners of a portion of the capital stock are not within the state, so that they can be reached in the mode in which resident owners of the stock are taxed. As to a tax upon the shares, as choses in action and the source of income, the legislature of Vermont have no right to tax those which belong to non-resident citizens, because they are not here, but in a foreign jurisdiction, of which they have no control or any right to levy taxes upon them. And as to the property or capital stock, or the franchise of the corporation, which is within their jurisdiction, they may undoubtedly tax either, or both, in their discretion. But if they do not choose to do it, so far as the resident owners of the shares are concerned, the towns, through their influence in the legisla-

[34] Attorney-General *v.* Winnebago Lake & Fox River Plank-Road Co., 11 Wisc. R. 35.

ture, requiring that it be distributed according to ownership for the purposes of taxation, and not all taxed in mass to the corporation in the place of its principal office, or if for any cause they cannot obtain an act to levy taxes directly upon the corporation as to *all* the stockholders, neither can they do it as to *any* who are citizens of the United States, — the Constitution of the United States having secured uniformity of taxation to them in common with the resident citizens. How it might be as to shares owned by non-resident aliens, it is not necessary to inquire. It is not clear in my mind that a levy *in this form* would be valid, even where shares were held by non-resident aliens.

6. It is a levy upon the corporation, to be paid by non-resident shareholders who have no notice of the proceedings, and where the whole proceedings are without any jurisdiction over them. It has been held that such a levy is void upon general principles, it being in the nature of a decree of forfeiture or confiscation of property, or the profits or a portion of them; and the principle would be the same if it went the whole extent of all the profits or all the property; and this wholly without jurisdiction. It seems nothing less than an arbitrary appropriation of private property, belonging to citizens resident abroad, to the public use of the state, when the owners are not notified of the proceedings or represented in the legislature. It was expressly decided,[35] that the bonds of the corporations of that state, or the stock of such corporations, any of which are owned by inhabitants of another state, are not liable to taxation in the State of New Jersey. And this seems to bring the question of jurisdiction, for purposes of taxation, over shares in joint-stock companies, to the true point. It holds truly, that as sources of income, they are properly taxable to the holder, but not to the corporation, any more than debts are taxable to the debtor.[36] For shares in a joint-stock company, being the right to share in the surplus after all other liabilities are cancelled, are in the nature of a debt, conditional, indeed, but really a mere chose in action. But the shares are not the property of the corporation, or taxable to them. It was accordingly held,[37] that the corporation is not liable to be taxed

[35] State *v.* Ross, 3 Zab. 517.

[36] The People *v.* Commissioners, 33 Barb. 116.

[37] State *v.* Thomas, 2 Dutcher, 181.

upon the shares of non-resident owners, and that, if they pay such a tax, they cannot retain it out of dividends declared upon such shares. The company having no control over the shares, and no agency on behalf of the owners, any such payment must be regarded as voluntary. And the mere color of legislative or judicial proceedings, wholly without jurisdiction, will not render the payment compulsory, in the view of the law. So in Hood's Estate, 21 Penn. State, 106, it was held that a collateral inheritance, where neither the property taxed nor the domicile of the ancestor was within the state, could not legally be taxed there.

VII. We conclude therefore that this imposition, as a tax, is void for many reasons and upon many grounds.

1. If it be attempted to be justified as a mode of taxing the non-resident stock and resident equally, it wholly fails of any such purpose, since the tax is much more in amount than is ever required of residents for any purposes of state taxes. And it would scarcely be claimed that the state could collect for their own use town and county taxes from persons who belong to no town or county in the state. And if it were ever so small, that would not make it legal, if levied in this mode.

2. In a book [38] of high credit, and which has been often quoted with approbation by the courts in this country, it is said: "The general rule appears clearly to be, ... every person is liable to be assessed for his personal property in the state of which he is an inhabitant; and stock owned in incorporated banks, &c., by non-resident holders thereof, *is not subject to the taxing power of the state*. Indeed the stock is not a thing capable in itself of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity *confined to the person of the owner*, who, if he be a non-resident, *is beyond the jurisdiction of the state, and not subject to its laws*." [39]

3. As a tax upon the portion of the capital stock of the railways represented by the shares of non-residents, it may justly be said that the shares do not represent any particular portion of the capital stock. But if we were to admit that the share-

[38] Angell & Ames on Corp. § 458.

[39] Union Bank of Tennessee *v.* The State, 9 Yerg. 490.

holders are tenants in common of the capital stock, which is not true in any strict legal sense of title, we still encounter the fatal irregularity so often before alluded to, of taxing the interest of one tenant in common *upon a totally different principle* from that which we apply to the interest of other tenants, which seems at war with all just notions of taxation.

4. If it be well founded in law, that the legislatures of the several states possess the power to tax property within their limits, belonging to citizens of the other American states not resident in the state where they hold property, upon principles altogether distinct from that upon which they tax the same class of property belonging to resident citizens, then indeed are the property-rights of non-resident citizens wholly at the mercy of such legislature, with no check or control whatever, which we think we have sufficiently disproved, as being at war both with the general principles of taxation, and the fundamental principles of the United States Constitution.

VIII. In regard to the right of these non-resident citizens and shareholders to obtain an injunction out of chancery, in the Circuit Court of the United States, restraining the treasurer of the company from paying over any such tax as is required by the statute to the treasurer of the state out of the dividends upon these shares, or against the treasurer of the state from taking proceedings to enforce the tax, we think there can be no question whatever. It seems to be almost the very point decided in Osborne *v.* The Bank of the United States.[40] The Circuit Courts of the United States possess full jurisdiction in the case, on account of the non-residence of the plaintiffs, and the subject-matter of the imposition being in violation of the guaranties of the United States Constitution, which it is the especial duty of the Federal Courts to vindicate and enforce, it seems highly proper they should be appealed to in regard to it. There can be no question, therefore, in my judgment, either in regard to the right or the remedy.

[40] 9 Wheaton, 738. The legislature cannot pass a law to govern a particular case. It is a mere decree. Holden *v.* James, 11 Mass. R. 496.

SECTION VI.

Power of the Legislature to modify the Charter of Trinity Church, New York.

1. *The real question involved in the whole case, is settled by the act of* 1814.

I. *Was Trinity Church, in* 1814, *a private corporation?*

1. *This question has been evaded, by calling the property of Trinity Church a trust. But the same question arises in regard to a trust, as in regard to a corporation, whether it is public or private.*
2. *Eleemosynary corporations, colleges, academies, and churches are private.*
3. *Distinctions between public and private schools.*

4, 5, 6, 7. *Law of the Dartmouth College case stated.*

8. *Analogy between that case and this stated; and other similar cases referred to, and the analogy between college and academic corporations and churches stated.*
9. *Definition of a public college or university.*
10. *Definition of a private college or university.*

II. *Trinity Church being a private eleemosynary corporation, it did not become subject to legislative control, because the principal fund arose from a royal grant.*

1. *Public grants to private corporations have always been common.*
2. *They impose no different duties from private grants.*
3. *Public colleges and academies may exist.*
4. *Parish churches in England, public corporations, but the parish system never transplanted into the colonies.*
5. *Conclusion, that Trinity Church is in all respects a private corporation.*

III. *Charter viewed as a contract.*

1. *Every amendment is also a contract, when accepted.*
2. *Cases upon the subject reviewed.*

IV. *How far such charters are subject to repeal, alteration, or amendment, by the legislature.*

1, 2. *The authority and application of the case of Dartmouth College* v. *Woodward stated.*

3. *Other cases in the United States Supreme Court stated.*
4. *The law of the cases in the State Courts discussed.*
5. *Case of Louisville* v. *The University.*

6, 7, 8, 9. *The law and the evidence concur in one result, that the State legislature have no control over this corporation, and never exercised or claimed any such control.*

V. *Is the proposed alteration of the charter a violation of the corporate rights?*

1. *No franchise of a private corporation more vital than that of self-government.*
2. *No security to the corporation that the legislature will not do injustice.*
3. *No justification for doing injustice to Trinity Church, that some great good is proposed to be thereby effected.*
4. *Or that the funds might be more wisely managed.*
5. *Or that the petitioners act in good faith.*
6. *It is easy for men to commit the most flagrant outrages upon private right, in most perfect good faith.*

7. *These illustrations may seem not likely to occur, but from the past we know not what to expect.*
8. *It may be said a void law can do but little injury.*
   1, 2, 3, 4. *But it does much, in many ways.*

VI. *Questions incidental to the main inquiry.*
   1. 1, 2, 3, 4, 5. *The relations and duties of the corporation, and of the* cestuis que trust, *in reference to their rights and duties, discussed.*
   II. *But if all that is claimed in regard to the facts is conceded, the act of* 1814 *did not impair any vested right.*
   III. *Non-parishioners never had the right to vote in the elections in Trinity Church.*
   IV. *Extent of the visitatorial power.*

§ 233 *c*. The following opinion, prepared at the request of the vestry of Trinity Church, New York, as it contains our own view of the law of one of the most important controversies in regard to property, both in amount and in the character of the questions involved, which has arisen in the country, and as it was, at the time, immediately acquiesced in by a very numerous, learned, and influential opposing interest, and has hitherto continued to be thus acquiesced in, and as many of the suggestions here made, although made nearly ten years ago, have a striking significance at the present time, when the constitution of the government is undergoing very marked changes, both by formal amendments and new constructions, we have thought we could present nothing more acceptable to the profession, and we are sure that no plea in favor of the inviolability of the written law could be more temperate, or earnest, or sincere.

In preparing an opinion upon the law of this case, I have endeavored to pursue the same course I should have done were the case before me judicially. The principal difference of which I have been conscious was the want of formal argument before me, when I could direct the attention of counsel to those points upon which I specially desired elucidation. This want has been, to a considerable extent, supplied by the arguments before former committees of the New York Legislature, and the reports of the majority and minority of some of these committees upon the several points involved. I have prefaced my opinion with no statement of facts, because they all appear in documents already in print, and a repetition of them here would only extend the opinion, to no useful purpose.

1. It seems to me that the discussions before the committees

of the New York Legislature, as is common before such bodies, took a much wider range than is necessary or desirable. I shall, therefore, confine myself mainly to those points which seem to me decisive of the rights of the parties. In this view it seems to me, as the controversy all turns upon the question of repealing or modifying the act of 1814, in relation to the charter of this church, that we may lay out of the case all extended examination of the rights of this corporation before the date of the act in question. For even if the corporation possessed the same rights before that act which it does under it, the repeal is not unimportant. I shall assume as unquestionable that the act of 1814 did constitute, or, more specifically, define an important franchise of the charter of this corporation. I mean the essential franchise of the qualification of its electoral body. And it will render the act of 1814 scarcely less important, if we admit that the corporation possessed substantially the same electoral franchise before that it did after that act. For the clear definition of an important franchise is as essential a grant as its creation.

I. The only inquiry, behind the act of 1814, important to the estimate of the inviolability of the corporate franchises of Trinity Church, is whether that church was justly to be regarded as a private corporation, or was to be treated as a public corporation.

The council of revision, consisting of some of the ablest jurists the State has ever had, having the law of 1814 under consideration, assume as matter of course that the charter is a "private grant," and one of the objections made to the act is based upon that ground alone. No question whatever seems to have been then made upon this point as matter of fact. And I am not aware that this has ever been seriously questioned by any one.

1. But from the discussions which seem to have arisen before the committees and among the different members, I infer that it has been attempted to be maintained, that the corporation have only a trust estate in the property granted to them, and that this is a trust of so public a character as to be subject to legislative control. This argument, if it has any just foundation, must rest upon the distinction between public and private corporations. For all corporate property is, in one sense, held in trust. It is a trust for the benefit of the shareholders in the case of private joint-stock corporations. It is upon this ground

that the directors of such companies are not allowed to contract obligations in conflict with the interests of the company which they represent.[1]

2. There is also a species of eleemosynary corporation, very numerous in this country, and whose creation is chiefly for the discharge of certain trusts connected with the general purposes of education and religion, which are of such vital importance to the general welfare, as scarcely to be surpassed in that respect by any other class of trusts, however public in their character, and which we are on that account apt to conclude must of necessity come under the class of public trusts. Under this class may be mentioned here incorporated schools, such as colleges and academies and incorporated churches, like the one which we are now examining. We have examined the subject as applicable to corporations for purposes of education very much at length, because the cases are numerous and the subject precisely parallel to that of charitable and religious corporations. Many persons, making no very clear discrimination between the public schools which are maintained in many of the states as a part of the general burden of taxation, and the class of schools referred to, whose support comes from funds accumulated both from private and public munificence, are liable to confound or to identify the two classes of schools.

3. But they are nevertheless wholly distinct upon the point in question. Those public schools which are maintained by general or local taxation are public corporations, and in all respects subject to the control of the legislature. It will make no difference in that respect that the corporate bodies, whether towns or districts, which have the control and support the burden of maintaining these schools, may also derive funds for this purpose

[1] *Ante*, §§ 140, 211, and numerous cases there cited. Davidson *v.* Seymour *et al.*, Law Reporter, July, 1857, p. 159; Redmond *v.* Dickerson, 1 Stockton, Ch. 507; Fawcett *v.* Whitehouse, 1 Russ. & M. 132; Charitable Corporation *v.* Sutton, 2 Atk. 400; Marshall *v.* Baltimore & Ohio Railw., 16 Howard (U. S.), 314, 325; Wood *v.* McCann, 6 Dana, 366; Hunt *v.* Test, 8 Alab. 713; Harris *v.* Roof, 10 Barb. 489; Rose *v.* Truax, 21 Barb. 361; *In re* Robert W. Lowber *v.* The Mayor, Aldermen, & Commonalty of the City of New York; and *In re* A. C. Flagg, Comptroller, and others, tax payers *v.* Lowber, *Ante*, § 140, note to pl. 3; Semmes *v.* Mayor, &c., of Columbus, 19 Ga. R. 471.

from private charity. If they do, as is sometimes the case, this does not change the character of the corporation, or exempt it from legislative control. The property thus obtained would not be liable to be diverted by the legislature from the general object or scheme of the charity. But the corporation is nevertheless wholly under the control of the legislature to alter or repeal at will. And if the funds of Trinity Church were held by a public corporation, it would be competent for the legislature to control the corporation in the manner claimed, keeping the funds and appropriating the income fairly for the purposes contemplated by the donors. Public corporations are confined to municipalities, such as towns, school districts, &c., and corporations whose stock is owned by the state, and which are of course under legislative control.[2]

4. But the legislature have no such control over a private corporation which holds funds for the purposes of education or religion or general charity. And colleges and academies and churches in this government are of this character. This point is expressly decided in the leading case of Dartmouth College *v.* Woodward.[3] The distinction between public and private corporations of this character is thus stated by Mr. Chief Justice *Marshall*, in the opinion of the court in that case. "If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power, imposed by the Constitution of the United States."

5. "But if this be a private eleemosynary institution, endowed with a capacity to take property for purposes unconnected with government, whose funds are bestowed by individuals on the faith of the charter," &c., he concludes it is to be regarded as a private corporation for the administration of a charity in some sense of a public character.

6. In illustrating the subject further the learned judge adds,

[2] *Ante*, § 17 and cases cited.

[3] 4 Wheaton, 518.

"That education is an object of national concern and a proper subject of legislation all admit. That there may be an institution founded by government and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer?"

7. And in conclusion the learned judge says: "It appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves, that they are not public officers, nor is it a civil institution participating in the administration of government, but a charity school or a seminary of education, incorporated for the preservation of its property and the perpetual application of that property to the objects of its creation."

8. Upon comparison it will be seen that all the incidents here enumerated apply to the condition of Trinity Church in 1814. The original charter was a royal grant made through the instrumentality of the local authorities, upon the petition of the corporators, and in the usual form of such incorporations, and with the ordinary corporate franchises of corporate action and perpetual succession. The authority of this case in regard to this point has never been questioned, but universally followed both in the national and state courts. See upon this point Allen *v.* McKeen,[4] where it is said, "Bowdoin College is a private and not a public corporation, of which the Commonwealth of Massachusetts was the founder; and the visitatorial, and all other powers, franchises, and rights of property of the college are vested in the boards of trustees and overseers established by the charter, who have a permanent title to their offices, which can be divested only in the manner pointed out by the charter."[5]

[4] 1 Sumner, 276.

[5] See also Bracken *v.* William and Mary College, 1 Call, 161, S. C. 3 Call, 573.

9. In the case of the University of Alabama *v.* Winston,[6] we have the definition of a public college or university. That was a case where all the funds of the college were public property, and all its officers, even the trustees, paid and appointed, either mediately or immediately by the state.

10. But in University *v.* Foy,[7] and in Den *v.* Foy,[8] a grant of land to the university is held to have created vested rights beyond the control of the legislature, on the ground that the University of North Carolina is a private corporation.[9]

II. It being then established that Trinity Church is a private eleemosynary corporation for the purpose of administering a charity, and that the legislature have ordinarily no control over the essential franchises of such a corporation, it can make no difference, as it seems to me, that the principal fund to be administered arose from a royal grant. (For Bowdoin College was endowed by a public grant from the State of Massachusetts.) It was not in the case of Trinity Church a grant contemporaneously with the charter, but made long after, so that the grant of the endowment cannot be said to qualify or characterize the grant of the corporate powers.

1. These public grants to private eleemosynary corporations were common both before and since the Revolution, and are still common. And no one supposes that because a college or an academy, or a church corporation receives a public grant of land, that it thereby becomes a public corporation subject to the control of the legislature, so that its charter may be altered or repealed at the will of the legislature. That is true of most of the colleges and academies in the different states, and it was never supposed that they thereby lost the right of private control and independent corporate action.

[6] 5 Stew. & Porter, 17.

[7] 2 Haywood, 310, 374.

[8] 1 Murph. 58.

[9] See also upon this point, confirming the general doctrine claimed, Wales *v.* Stetson, 2 Mass. R. 146; *Parsons*, Ch. J.; People *v.* Manhattan Co., 9 Wendell, 351; Thomas *v.* Daniel, 2 McCord, 354, admitting the same rule of construction after the constitution of the United States came in force. Yarmouth *v.* North Yarmouth, 34 Maine R. 411. The same is also held as to the University of Louisville, in Louisville *v.* The University, 15 B. Monroe, 642.

2. A public grant to a private corporation for the general purposes of its creation, which contains no conditions or reservations, is as much irrevocable and as really a gift beyond recall or control as any private grant made with the same incidents. And it imposes no more or different duties or responsibilities upon the donee from any private grant in the same terms. This proposition is fully maintained in the cases already cited.[10] It is said in the case last referred to, "If a corporation be eleemosynary and private at first, no subsequent endowment of it by the state can change its character. It is not sufficient to render a corporation public that its ends are public." — "Colleges and academies for the promotion of piety and learning, and endowed with property by public and private donations, are, in a legal sense, equally with hospitals for the relief of the poor, sick, &c., considered as private eleemosynary corporations."

3. In all this we do not intend to deny that public colleges and academies may be, and often are, created in this country. But that is, as we have seen, where the endowment is exclusively public and the control retained by the public. But a public church corporation in all the American states is incompatible with our institutions.

4. It was no doubt true under the English constitution, that the parishes in England were, and are still in some sense, public corporations and subject to parliamentary control. But the English church establishment, as such, does not extend to her Colonies. The parish system has never been transplanted there. And incorporations of churches in communion with the Church of England in the Colonies, were regarded the same as collegiate and academical incorporations, as being of a private and independent character; the same precisely as to their private character as would have been the incorporation of a Presbyterian or Lutheran congregation.

5. So that we may fairly conclude, beyond all question, that the parish of Trinity Church from its inception, was a private corporation wholly independent of all rightful legislative control,

[10] See also The Bowdoin College case, 1 Sumner, 276, and University *v.* Louisville, 15 B. Mon. 642. And in the University of Maryland *v.* Williams, 9 Gill & Johnson, 365, this point is expressly decided.

and that it has always been so regarded and treated. Not that the legislature under the English constitution did not possess the power to repeal or modify corporate charters, for it is well known the British parliament did possess that power; but it was never regarded as a power which could be rightfully exercised in the case of private corporations, except in extreme cases, as in the suppression of the Knights Templars and the Religious Houses under Henry the Eighth; and which it seems the present movement is designed to repeat in this country in defiance of the express provisions of the United States Constitution to the contrary. Such an attempt to inaugurate in the American states that most offensive doctrine of the omnipotence of parliament, in the place of the limited authority which has been confided to our legislatures, cannot receive countenance from any judicious and dispassionate mind.

III. This church, then, being a private eleemosynary corporation, its charter was a contract within the protection of that provision of the United States Constitution which inhibits the states from passing laws impairing the obligation of contracts. And so, equally, is any essential amendment of the charter. For this quality of a charter of a private corporation rests upon the proposition mainly that the charter is a contract, inasmuch as it confers certain franchises and privileges upon the corporation, and in return requires certain duties of the corporation, which become obligatory only upon the acceptance of the charter by the corporators, which constitutes it essentially a contract.

1. It is also true of every amendment of the charter of a private corporation, conferring new franchises, or privileges, or upon new conditions, that it does not become binding upon the corporation, unless by the acceptance of the corporation. And the acceptance of an amendment of the charter of an eleemosynary corporation, by a majority, who for all purposes, in such corporations, represent both the corporation and the donors of its funds, is all that is ever required.[11]

[11] Louisville *v.* The University, 15 B. Monroe, 681; *Ante*, §§ 19, 20; *per Story*, J., in Dartmouth College *v.* Woodward, 4 Wheaton 518, 666, *et seq.* See also upon this point the following cases, fully sustaining the view here taken, *Rogers*, J., in Ehrenzeller *v.* Union Canal Co., 1 Rawle, 190; Commissioners *v.* Jarvis, 1 Monroe, 5.

2. In the case of Washington Bridge Co. *v.* The State of Connecticut,[12] the point is expressly decided, that any enlargement of the charter of a private corporation, so accepted as to become binding, is the same, as to its inviolability, as if it had formed a part of the original grant.[13] It is held, also, in the last named case, that a statute, very similar to the one asked for in the case of Trinity Church, is void, as being opposed to the fundamental principles of right and justice inherent in the nature and spirit of the social compact, independent of all express constitutional prohibition. This was the practical construction of the British constitution, upon this particular point, and it is the only view which commends itself to our sense of justice and fair dealing. The last case referred to was that of an act incorporating the University of Maryland, and the subsequent act, declared void, proposed to create a new regency. In Norris *v.* The Abington Academy,[14] it was held, that even where the corporation, in performance of the condition of an act of the legislature, enlarging its powers, and for a pecuniary consideration, had conveyed all their estate and effects to the state, that the legislature nevertheless could not vest the government of the corporation in a new board of trustees. And in Vermont, where the state, in the charter of towns, reserves one right of land for the use of a county grammar school, and had incorporated such a school, with power to receive the rents of such lands, it was held, they could not subsequently divert any portion of the rents, to the use of other similar schools, subsequently created.[15]

IV. The amendment of the charter of the corporation of Trinity Church then, in 1814, being the same as a new charter, we have only to inquire how far any such charter is subject to repeal, alteration, or amendment. This is the principal question discussed and determined in the case of Dartmouth College *v.* Woodward, already referred to. That was a case very similar,

[12] 18 Conn. R. 53.

[13] The same principle is maintained in Gordon *v.* The Appeal Tax Court, 3 How. (U. S.) 133. See also University of Maryland *v.* Williams, 9 Gill & Johnson, 365, where the same views are maintained.

[14] 7 Gill & Johnson, 7.

[15] Burt *v.* Caledonia County Grammar School, 11 Vt. Rep. 632.

in many of its facts, to the present case. That was a controversy, in regard to the constitution of the governing body of the corporation. The professed purpose and object of that reform, as of all reforms, in popular governments, was to liberalize the institution. But the court held that the provision in the United States Constitution, against state laws, impairing the obligation of contracts, had reference to such reforms, and cut them up by the roots. And it is not too much to say that this decision and others in regard to the different application of the same principle, have done more to protect the essential pecuniary rights of the citizen, and especially in regard to corporate interests and franchises, against unjust encroachments, from whatever source, than any other ever made, by any judicial tribunal, in the country. It is one of the most indispensable barriers against legislative injustice, which was ever incorporated into the constitution of a great empire. And although not itself a new principle, its application to the charter and franchises of private corporations was new, and it seems to me one of the most important safeguards to property and private rights which wisdom could have devised or justice defend and enforce ; and my surprise is that, in form even, it should have been unknown to the English constitution. And the cases which we have referred to, and may hereafter refer to, show very clearly, that the principle has been very strenuously adhered to, with a single exception hereafter referred to, by all the judicial tribunals of the country, since its first promulgation. And it is so plain, and so simple, in itself, as scarcely to admit of illustration or elucidation. But we shall refer briefly to some of the subsequent decisions, which have followed the leading case upon this subject, that of Dartmouth College *v.* Woodward.

1. The authority and principle of the decision may be thus stated, as was done by the court in Thorpe *v.* Rut. & Bur. Railway.[16] "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 constitution, by the

[16] 27 Vt. R. 140.

court of last resort, must be regarded as [altogether decisive of the law and] the common starting-point" of all the decisions upon the subject.

2. 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 case 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.

3. The other cases in the United States Supreme Court, further illustrating and enforcing the same principle, as applied to private corporations, are not numerous. Providence Bank *v.* Billings,[17] is in regard to the right to tax an existing corporation, its charter containing no provision upon that subject. The Court held the corporation could claim no exemption from taxation, except by express grant. In Gordon *v.* The Appeal Tax Court,[18] it was held that such an express exemption from taxation, contained in the charter of the corporation, was perpetual, and inviolable by any act of the legislature. But if the charter of such corporation were extended, without any express provision in the act making the extension in regard to taxation, the right of taxation would revive. The cases of State Bank *v.* Knoop,[19] Ohio Life and Trust Company *v.* Debolt,[20] are to the same effect. In Planters' Bank of Mississippi *v.* Sharp,[21] it is held, that a law prohibiting any bank from transferring by indorsement, or otherwise, any note, bill receivable, or other evidence of debt, impairs the obligation of the charter of a bank, by which it is empowered to acquire and dispose of goods, chattels, and effects, of what kind soever, nature, and quality, and to discount bills and notes. It was also decided[22] that a law, which deprived

[17] 4 Pet. 514.
[18] 3 How. 133.
[19] 16 How. 369.
[20] 16 How. 416.
[21] 6 How. 305.
[22] Curran *v.* Arkansas, 15 How. 304.

creditors of all legal remedy against a corporation, or its property, impairs the obligation and effect of its contracts, and is invalid.

It was attempted to be maintained, in the opinions of the state court, in deciding the cases,[23] that the charter of a private corporation, like a bank, is not a contract, within the meaning of the United States Constitution, prohibiting the legislatures of the several states from passing laws impairing the obligation of contracts, but an act of legislation which may be repealed whenever the legislature shall deem it expedient. But these cases were reversed, in the national tribunal of last resort, and the doctrine of the case of Dartmouth College *v.* Woodward re-asserted, so late as 1855.[24]

4. The general doctrine of the inviolability of corporate rights and franchises, so far as private corporations are concerned, and which are of a pecuniary character and quality, that is, are intended and calculated to affect property, is recognized in all the states where the question has arisen, unless Ohio form an exception. The cases cited in the note involve the discussion of that very point, more or less directly.[25]

5. The distinction between the class of corporations, where the right of legislative control does, and where it does not exist, is well stated, in the case of Louisville *v.* The President & Trustees of the University.[26] It is there held, that "the state does not possess unrestrained power over a corporation not invested with political power, nor created to be employed and partake in the administration of government, nor to control funds belonging to the state, nor to conduct transactions in which the state was alone interested." "The legislature has such power over

[23] Mechanics' & Traders' Bank *v.* Debolt, 1 Ohio St. 596, and in Toledo Bank *v.* Bond, 1 Ohio St. 622.

[24] Dodge *v.* Woolsey, 18 How. 331; Mechanics' & Traders' Bank *v.* Debolt, 18 How. 380, and Same *v.* Thomas, 18 How. 384.

[25] Commercial Bank *v.* The State, 6 Smedes & Marshall, 599; Commonwealth *v.* Cullen, 13 Penn. St. 133; Bank of the State *v.* The Bank of Cape Fear, 13 Iredell, 75; Brown *v.* Hammond, 6 Penn. St. 86; City of St. Louis *v.* Russell, 9 Missouri, 507; New Orleans, &c., Railw. *v.* Harris, 27 Mississippi R. 517; Slack *v.* Maysville & Lexington Railw., 13 B. Mon. 1. See also The People *v.* The Manhattan Co., 9 Wendell, 351; Same *v.* The Supervisors of Westchester, 4 Barb. 64.

[26] 15 B. Monroe, 642.

such corporations alone as may be characterized as the agents or instruments of the government." "An University is not such a corporation, and funds bestowed upon it by a city are beyond legislative control. The original charter of the University of Louisville creates a private corporation, and so much of the amended charter of the City of Louisville as relates to the pre-existing charter and corporation of the University, and vests, or professes to vest, in a new corporation, or in new trustees, the property and privileges of the original corporation, is in violation of the United States Constitution, and void."

6. I might refer to other cases, involving the general question of the inviolability of corporate franchises, but I have selected only such cases as seemed to me directly in point, and to involve the very questions which I have discussed. And it will have been seen that the cases all concur in the leading point decided, in the case of Dartmouth College *v.* Woodward. These questions have arisen more frequently in regard to the chartered rights and franchises of colleges and academies, than in regard to those of churches. But the line of demarkation, between the classes of corporations, where the state does, and where it does not, retain legislative control, in corporations of every kind, is identical with that between public and private corporations. And it will not be claimed, by any one, that, in this government, churches have any the slightest claim to be considered as public corporations, as political or civil institutions, like school districts, towns, and counties, in short, to be treated as the agents or instruments of government, and, therefore, under legislative control.

7. It seems to me therefore certain, beyond all question or doubt, that neither the state nor federal courts would sustain any act of the state legislature, in any sense modifying or enlarging the qualifications of the electors in the corporation of Trinity Church. I should therefore feel compelled to regard all such attempts as void, and all efforts from without to induce such legislation as indeed idle and frivolous, after the numerous decisions which have been made, by almost all the judicial tribunals of the country, with surprising unanimity, upon the very point in question.

8. And especially should I regard such efforts as strange and

almost incomprehensible, upon any rational hypothesis, after an acquiescence of the corporation, and of the electors and the vestry, who are the corporators, and of all claiming an interest in the question, for more than forty years (twice the limit of prescription in regard to the gravest pecuniary rights), in the amended charter of 1814, clearly defining the qualification of the electors in the government of the corporation. In the case of the Episcopal Church *v.* The Newbern Academy,[27] it was held, that where the legislature by an act transferred the glebe land of the church to the academy, without the pretence of constitutional right to do so, the acquiescence of the church for thirty-five years concluded their title, notwithstanding the unconstitutionality of the act. It would be singular that a prescription should not apply in favor of a church corporation as well as against it.

9. That the legislature never regarded Trinity Church, in any sense, as a public corporation, or under the patronage of the state, is clearly shown by the formal protest contained in the act of 1784 against any such conclusion, this being the first act passed by the legislature of the state in aid or amendment of the charter of that corporation.

V. It becomes important next to consider, whether the proposed qualification of the charter of this corporation is of a character to violate its essential franchises.

1. It must, we think, readily be admitted, that among the most essential of corporate franchises, is that of self-government, according to the fundamental law of the charter. (And the idea of self government, or free will, according to, or in subserviency to the will of the legislature, is certainly an anomaly, if not a solecism.) The right of the corporation to govern itself, according to the terms of its charter, was the very question involved in the case of Dartmouth College, and is the only question involved in this case. And if any franchise of corporate action can be regarded as vital, this may surely claim that character. The books enumerate many essential corporate franchises, such as succession during the term of the charter, the power to

[27] 2 Hawks (N. C.), 233.

contract, to sue and be sued, by the corporate name, to hold land for the purposes of the incorporation, to have a common seal, the power of amotion, or removal of members, and some others, all of which are held inviolable under the United States constitution. But none of these are so vital to the very existence of the corporation and the free exercise of its powers, as that of self government, according to its charter. The denial of this involves the denial of all others, and may be made practically to absorb and destroy all others.

2. And it is no satisfactory answer to say, that it is not to be presumed, or indeed admitted, that the legislature would be guilty of injustice. It is not enough for the owner of property to be assured that his property, or his rights, are taken from him for wise purposes, or towards the accomplishment of some greater good. This may be true, and it is but the plea of tyrants, great and small, single or combined, in all ages. It is doing evil that good may come; it is the power of will, *ultima ratio regum*. And while such a plea is always false and disgraceful in principle, it is commonly so in fact, and never more so than in the present case.

3. And it affords no better vindication of the proposed usurpation, that this corporation is possessed of large funds, or that these funds might or were intended to subserve some wise and noble end, for mankind in general, or for those more immediately in the communion of this Church; or, that there is dissatisfaction in certain quarters, more or less interested in the disbursement of this charity. All this may be true, and the apparent apology which it affords for the interference only verifies the maxim, that mighty robbers acquire a certain degree of dignity, sometimes, from the very enormity of their offences, which in a measure redeems them from the contempt and disgrace which attaches to those whose genius or experience only enables them to dabble in petty villanies; and that, contrary to the popular maxim, that beggars should not be fastidious, they are sometimes more so, the more desperate their fortunes or their schemes, as a kind of excuse for the mode in which they pursue their vocation.

4. And if it could be shown that there has been indiscretion and want of wisdom and skill in the management or disburse-

ment of this charity, or even positive negligence and misconduct in its administration, it could avail nothing towards the vindication of such an illegal usurpation by the legislature. If any such thing were pretended, which never was by any one entitled to credit or consideration, the means of redress are obvious and ample in the judicial tribunals of the country.

5. And although, in charity to the weakness and the bias of human judgment, I feel compelled to admit my belief that most of those concerned in this effort to remodel the charter of Trinity Church act in the most transparent simplicity and good faith, it is none the less an attempt to divest that corporation of her chartered rights, upon mere false pretences, through the aid of that natural or rather common prejudice which exists, in a considerably numerous class of minds, against religious corporations possessing large endowments, and belonging to a communion, not numerous, and not always exempt from unjust prejudice, upon other grounds, and especially exposed to such prejudice, when it is seen that the outcry comes from within that communion, which to those who do not observe the position, or the interested motives of those who are active in getting up such clamor, renders it doubly effective as a means of impeachment, when in fact it should be regarded as less so, for the very reason which renders it more so.

6. We know the facility with which ardent men deceive themselves in regard to the purity or disinterestedness of their own conduct. And the movers in this attack upon Trinity Church, renewed from year to year, with the apparent hope of extorting by their importunity what the justice of their case will always fail to command; these men may deceive themselves, and verily believe they are attempting some great good; but the legislature and the public should be aware that if they give to such attempts more than the merest formal courtesy which parliamentary etiquette requires, they themselves may some day expect to become the victims of similar assaults upon private rights, when others shall apply the precedents thus made to the authors of them, and to their children, and thus justice shall commend the chalice which they now mingle to their own lips. They cannot forget that the humblest citizen, and the mightiest corporation, hold

their pecuniary rights by the same tenure, the public sense of justice. The same act of legislation which distributes the property of Trinity Church for such objects and purposes as seem meet to the legislature, or, what is the same thing in principle, subjects it to control foreign to its charter, might also deprive the humblest citizen of his home, or his bed, or his Bible. And if the first is allowed now, the day will come when the others cannot be successfully resisted.

7. These may look like extreme points of illustration of the principle, and so not likely to occur, but in looking at some changes which have occurred in the last twenty years I cannot think so.

8. And it may be thought of no great importance that such an act should be passed by the legislature, if it is wholly void, since the courts of justice would readily declare it so. But there is serious detriment coming from such statutes, or even the slightest legislative countenance to such petitions.

1. It is unjust, and exposes those interested to needless and unjust expense. This of itself is reason enough why all such attempts should meet the decided condemnation of every honest man, and especially every public officer. And it seems idle to require, or to attempt to give further reasons against such practices, when we have shown them illegal and unjust.

2. But it should be remembered, that to countenance such attempts encourages perseverance in evil, at the hands of those who hope to make it a source of gain to themselves, as well as of vexation to others, in many ways not needful to be here enumerated.

3. And it should not be forgotten, by the grave and serious, that there is a point, beyond which neither courts of justice nor executive officers in popular governments can possibly protect either natural or artificial persons against popular outbreaks, in the form of factitious public opinion, which may be carried such lengths as to induce violence and outrage of the most irresistible character, and which is as readily manufactured for an occasion, without just foundation, as with it. And often more readily, inasmuch as where there is real guilt, and abuse of power or trust, the more meddlesome become content to let the due ad-

ministration of the law take its course. It is only from a consciousness that the law is against the claim of a party, that he is induced to resort to the extraordinary measures of invoking the aid of illegal and unprecedented legislation, and other similar unusual appliances.

4. And where the slightest encouragement is given to this species of legislative interference, it serves to keep alive public clamor, which, however groundless, is sure to do injury to the objects of it. This must be my apology for the brief allusion which I have made to the practical evils of such lsgislative applications, and especially when they have the effect to subject the petitionees to the expense and vexation of making formal defence.

VI. Questions incidental to the Main Inquiry.

I. 1. Something has been said in regard to the nature of the trust upon which Trinity Church holds her property. It has been shown that it is not one of those public trusts, created by the legislature as instruments of governmental administration, which are, by consequence, under legislative control.

2. We have before said that all corporations, even joint-stock companies, hold their property in trust. This, unexplained, might lead some to conclude that the *cestuis que trust*, in all cases of corporate property, possessed the right to interfere in the administration of the trust. That is so in the case of joint-stock companies, where the shareholders are the equitable owners of the corporation, and the only *cestuis que trust.*

3. But the case of an eleemosynary corporation, created for the perpetual administration of a private charity, is a trust of a very different character from either a public corporation or a private joint-stock corporation. It is, in some sense, of an intermediate class between the two. It cannot, however, with any show of reason or argument, be maintained that, in the case of a public charity, like Trinity Church, the *cestuis que trust* have any vested interest in its disbursement which courts of justice could recognize, or which could be said to be violated, by any amendment of the charter of the corporation accepted by them, as in the act of 1814. The objects of a public charity, when not limited or defined, are absolutely unlimited, and, from the very nature of

the grant, include the whole world. The duty of the almoners of such a bounty or charity is co-extensive with the cardinal moral virtue of benevolence. It is to do good unto all men as they have opportunity, and, in the case of a church charity, especially to such as are of the household of faith.

4. It could not, with any show of plausibility, be claimed that such a scheme of charity could be enforced by a bill in equity, at the suit of all or a representative portion of the beneficiaries of the charity. This could only be done by some conventional representative of the public in general, as the Attorney-General, in England. Not because the corporation is a public one, but because the misapplication of its funds, in the case of any private charitable corporation, is a public offence, a breach of trust, which a court of equity will redress, at the suit of any proper formal representative of the public, against which this breach of trust is a *quasi* offence.

5. We have alluded to this point here to show that there is no ground of pretence that any vested rights were violated in the amendment of the charter of Trinity Church in 1814, by consent of the corporation. The right to a participation in the fruits of this charity was not of the class of vested legal rights, but of that class of imperfect rights, the obligation of which can only be enforced in the forum of conscience.

II. But if we admit all that is claimed in regard to the right of non-parishioners to vote in the elections before the act of 1814, which no person, examining the law of the case dispassionately, could for a moment do, it would have no tendency to invalidate the act of 1814 as to non-parishioners, or to show the existence of any such rights as are now claimed. The act of 1814 was merely defining the mode of exercising the electoral franchise in this corporation, and establishing certain safeguards against its abuse; like that of requiring the names of voters to be registered, or to have resided for a definite term within the parish, or to have been parishioners for a definite term, or to have been pew-holders; and which in no sense divested any *right*, but only defined the *remedy*. And if it might be said in some sense to have rendered the remedy more difficult to those who had broken off parish relations, and less efficacious, as it did not substantially

remove all remedy (but left the means of redress upon conditions easy of performance by all, and which are in themselves reasonable, fitting, and necessary, and not unusual in such cases), it came within the acknowledged discretion of the legislature. For every Episcopalian in New York may still qualify himself at slight inconvenience to vote at the elections in Trinity Church.

The law in regard to what change of remedy may be said to impair the obligation of contracts is well stated by *Johnson*, J.:[28] "It is not enough that the remedy is changed, and rendered less speedy and convenient. If there is still a substantial remedy left to enable the party to enforce his rights, that is sufficient." But we need not dwell upon this view of the case, as we do not regard it as having any existence in fact. And we have thus far dwelt upon it to show that if the claim were founded in fact, it was not impaired or divested by the act of 1814.

III. But we must be allowed briefly, but distinctly, to dissent from the entire claim, that non-parishioners ever had the right to vote at the elections in this corporation.

1. I assume this not to have been the purpose of the charter, from its inherent unreasonableness, and its conflict with all precedent or practice in similar corporations. The idea of the community or body of electors in any corporation, political or private, being composed of those having no connection with the corporation, or its specific object or functions, involves a solecism too gross to be seriously entertained by courts of justice in their search after the probable purpose of the grant of a charter to such a corporation, when no such intimation is found in the charter itself.

2. I regard the contrary as established by an acquiescence of nearly a century since the establishment of the first Episcopal church in the city of New York, independent of Trinity Church, in 1793. This is a prescription of such a character that it could not be disregarded by any judicial tribunal having any respect whatever either for its own character or for the judicial wisdom and experience of past ages.

And the fact that some men have been bold enough to deny

[28] James *v.* Stull, 9 Barb. Supt. Ct. 482.

the soundness of this construction of the charter of Trinity Church, detracts in no sense from the force of the prescription, as evidence of the law whereby the construction of the charter becomes irrevocably fixed by the force of the prescription; or of the fact that the construction was the true one, or it would not thus have been acquiesced in. For to interrupt a prescription, something more is requisite than the protest of one or two persons, as is the fact in this case, or, indeed, of any number of persons, as the case might be. To interrupt a prescription, measures should have been taken to arrest the exercise of the right claimed, and to enforce the counter claim, or the corporation must be shown to have acquiesced in such counter claim, nothing of which has ever been pretended in the case of Trinity Church.

The objections now or hitherto made to the justness of the practical construction of the charter of Trinity Church, no more tend to qualify the inherent rights of the corporation, based upon such long and uninterrupted exercise of such rights, than does the malignant doctrine of the Red Republicans, that all property is theft, tend to impeach or defeat the titles of families to their hereditary patrimony after the lapse of centuries of quiet enjoyment; or than do the revilings of the maligners of Christianity tend to impeach its pretensions to miraculous power to regenerate and sanctify the Faithful. Mere clamor, however loud or long continued, is no such interruption of a prescription as to destroy or essentially weaken its force. I conclude therefore by saying, that in my judgment there is no property in the city of New York more effectually beyond the specific control of the legislature than that of Trinity Church. It is precisely the same, in its relation to the control of legislation, with any other property, whether owned by natural persons or corporations. The legislature has the same power over, and right to control, corporations, that it has in regard to natural persons. It may, in the case of either, affect essentially the status or relations of property, by general laws, but not by special edicts, which in nowise partake of the character of laws.[29]

[29] This whole subject is discussed very much at length in Thorpe *v.* Rut. & Bur. Railw., 27 Vt. R. 140, and *ante*, § 231.

IV. If it could be maintained, which I think it could not, with any show of plausibility, that the State of New York, as successor to the former sovereignty, retains a visitatorial power over this corporation, this does not extend beyond the enforcement of the statutes, and the duties or responsibilities and trusts thereby imposed upon the corporation. It gives no power whatever to change the foundation, or to interfere with the organization or franchises of the corporation.[30]

In Louisville *v.* The University,[31] it was expressly declared, as a corollary from the case of Dartmouth College *v.* Woodward, "That where trustees are incorporated to administer a charity, and the endowment is made by individuals, [and we have seen that a public endowment has the same effect as a private one,] the donors have no longer any interest in the property while the corporation exists, but only a reversionary interest in case of its extinction; and that the present rights of property are vested in the trustees, who under the charter represent the donors, as well as the objects of the charity, and may vindicate against wrongful assault, both the property and the franchises of the corporation; while the donors, as such, have no present right in the matter, unless it be that of appealing to the courts to coerce a compliance with the charter." This seems to me to contain the very essence of the visitatorial power of the state over this corporation, if I could admit any such power, which I am certainly not prepared to do, and which it is not important to discuss here, as no question of that kind has ever been raised.

[30] This is fully established by the case of Dartmouth College *v.* Woodward, 4 Wheaton, 518. Allen *v.* McKeen, 1 Sumner, 276, and the other cases referred to.

[31] 15 B. Monroe, 642, 681.

*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.[1]

[1] *Ante*, §§ 17, 41, 55, 56, 59.

2. This subject is incidentally alluded to in former portions of 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 of 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, *bonâ fide* subscribed and paid in, which, as they do not seem to have come much under discussion, in the judical 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. 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]

[2] London Grand Junction Railw. Co. *v.* Freeman, 2 Man. & Gran. 638, 639; Jackson *v.* Cocker, 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, 179.

[6] Herrick *v.* Vermont Central Railw., 27 Vt. R. 673, 692. Opinion of court:

and more or less fradulent in their * operation upon the market value of stock sold at a higher price. But we see no reason to

" 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 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. R. 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

doubt their binding obligation upon *those who approve them by their votes, and it would seem that the minority who vote

cases it has been allowed as a defence at law. The case of Ketchum *v.* Catlin, 21 Vt. R. 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 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

against them should take measures to stop * them before the stock goes into the market and falls into the hands of *bonâ 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. A very similar series of expedients is perhaps more

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 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 shareholders, 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 $ 21,000, was executed.

The court held that the defendant, as a *bonâ 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 practised by way of bonds and mortgages and preferred stock, which 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 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 money-eyed 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, 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 guarantied 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

[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.

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 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]

[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.

[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

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

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 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 corporation 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.

it was created, although subsequently coming into the hands of a *bonâ 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 such person was aware of the bad faith of the agent, he not only acquired no title to the stock, but a *bonâ fide* purchaser of him would stand in no better situation.[10]

[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 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 *bonâ 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

11. And it is, we think, impossible to doubt that the final result *arrived at, is far more consonant with acknowledged principles 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

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 very recent 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 *bonâ fide* holders, for value, without notice of any infirmity affecting them, such holder could not recover for them, as against 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 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, 31 Law Times, 70. In a later English case, however, it was held, that where shares in a company have been issued fraudulently, a *bonâ 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 *bonâ 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.

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 exhibit 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 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 *bonâ 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

[11] Athenæum Life Insurance Co. *v.* Pooley, 3 De G. & Jones, 294; *post*, § 240.

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 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.,

[12] Steiner's Appeal, 27 Penn. St. 313. See this subject further discussed in § 235.

[13] Pollard *v.* Maddox, 28 Ala. R. 321.

[14] Searle *v.* Law, 15 Simons, 95.

[15] Barton *v.* Gaines, 3 H. & N. 387.

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 or 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, 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

[16] *Ante*, § 35; *post*, § 239.
[1] 8 & 9 Vict. c. 16.

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 * only remedy of the mortgagee, unless by taking possession of the works, and receiving the tolls.[6]

[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., 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.* Jortin, 31 Law Times, 44, reversing the decisions of the Vice-Chancellor and of the Chancery Court of Appeals.

[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 railroad company has no title to the income

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 the 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 appointed, who is to pay out the money

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., 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., 8 Eng. L. & Eq. 544; s. c. in error, 14 Eng. L. & Eq. 535; Bolckow *v.* Herne Bay Pier Co., 16 Eng. L. & Eq. 159; Perkins *v.* Pritchard, 3 Railw. C. 95; 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 Railw. & Canal Co., 29 Law Times, 107; Crewe *v.* Edleston, 29 Law Times, 241. And see Baker *v.* Admr. of Backus, 32 Ill. R. 79.

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 effects of the company by an order from them.[12]

[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, was held in Dunham *v.* Isett, 15 Iowa R. 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 railroad 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 railroad 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, to the extent of its jurisdiction, at the complaint of the party aggrieved, by injunction, and the appointment of a receiver. State *v.* Northern Central Railw., 18 Md. R. 193.

A railroad 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. R. 79; *ante*, § 224 b.

[12] In Ohio & Miss. Railw. *v.* Fitch, 20 Ind. R. 498, it was held that the mere

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]

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.

[13] Russell *v.* The East Anglian Railw., 6 Railw. C. 501; s. c. 3 Mac. & G. 125; Fripp *v.* Chard Railw., 21 Eng. L. & Eq. 53.

[14] Russell *v.* East Anglian Railw., 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 R. 437. The same point is reaf-

A * 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

firmed in Mobile and Cedar Point Railw. *v.* Talman, 15 Alabama R. 472. In this last case it is said, in regard to the contract of mortgage, that neither the fact, 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. R. 155; Coe *v.* Columbus, &c. Railw., 10 Ohio State, 372; Coe *v.* Knox County Bank, Ib. 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 company, 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 R. 437; Pollard *v.* Maddox, 28 Alab. R. 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 railroad 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 railroad mortgage to sell the road, is a ratification of the mortgage so far as the state or public is concerned. A mortgage of a railroad 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

the mortgage 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]

N. H. R. 127. In Ohio, by the use of apt words, property to be hereafter acquired may be covered by mortgage. Coopers *v.* Wolf, 15 Ohio St. 523. But the power to mortgage is limited to such property as the company could lawfully acquire. Taber *v.* Cincinnati, &c. Railw., 15 Ind. R. 459. A trust deed is in legal effect a mortgage. Coe *v.* Johnson, 18 Ind. R. 218; Coe *v.* McBrown, 22 Ind. R. 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 R. 552. The power of a railroad company to mortgage its property, and the rights acquired by the mortgagee, are extensively discussed in a late case in Kentucky. Bardston 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. R. 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., 33 L. J. Ch. 93. *Anté*, § 234, pl. 12. And even where the directors of a company have no power to borrow, money lent the company and *bonâ 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. R. 459.

[19] Junction Railw. Co. *v.* Ruggles, 7 Ohio St. 1.

[20] Ottawa Plank-Road Company *v.* Murray, 15 Illinois R. 336. And a mort-

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]

gage may be ratified by a subsequent board of directors. Hoyt *v.* Mining Company, 2 Halst. Ch. 253. But where the bonds of a railroad 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 R. 331. See also Magdalena Steam Nav. Co. *in re*, 1 Johns. Eng. Ch. 690.

[21] Wheelock *v.* Moulton, 15 Vt. R. 519 ; Bennington Iron Co. *v.* Isham, 19 Vt. R. 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 R. 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. *Post*, § 235 *a*.

In addition to what will come more properly under another head, *post*, § 241, 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 *bonâ 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

*13. In a recent case in New Hampshire,[23] by an act of the legislature, the Portsmouth and Concord Railway Company

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. R. 477; Felton *v.* Deall, 22 Vt. R. 170; Fay, Petitioner, 15 Pick. R. 243; McCauly *v.* Givens, 1 Dana, 261; 1 Green (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 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 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 section 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 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

[23] Pierce *v.* Emery, 32 N. H. R. 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 New H. R. 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

were * authorized to issue bonds, and to execute a mortgage to trustees, to secure the payment of such bonds, "of the whole, or

bonâ 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.

We see no reason why this rule should not apply to railways in this country,

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.

But the doctrine that the property of a railroad 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. R. 214; Corry *v.* Londonderry & Enniskillen Railw., 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 Aslett *v.* Farquharson, 10 W. R. 458.

a part, of * the real or personal estate of the corporation," and by the mortgage to give the trustees authority to sell " the real

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 legislature. Upon this ground was decided the case of Hall *et al.*, Trustees &c. *v.* 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.

and personal * estate, and all the rights, franchises, powers, and privileges named in the mortgage deed, or any part thereof,"

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 forever debarred and foreclosed from all equity of redemption of the mortgaged property. 3d. That a receiver may be appointed for certain purposes, which it is not necessary here to specify. 4th. That a sale may be made of the franchise and property mortgaged. 5th. For relief generally; under which last prayer the complainant's counsel, at the hearing, asked for a foreclosure by sale, instead of a strict foreclosure as specifically prayed for, provided the court should be of opinion that a foreclosure by sale would be more equitable.

"The railroad corporation has demurred to the bill; and I will now state my opinion upon the several questions which have been argued, so far as they are necessarily raised by the demurrer.

"The first is, whether the mortgage is valid, and competent to convey what it purports to convey. The objection made by the respondents is, that the grant by the state of the franchise to be a corporation, and to build, own, and work a railroad, and take tolls thereon, is attended with an obligation on the part of the company to exercise these franchises for the public benefit; that consequently the corporation cannot divest itself of its railroad and all the other necessary means of discharging its public duty; and as these franchises were confided to the particular political person, they can be exercised by that person alone, and any attempt to delegate them to others is inoperative and void, upon grounds of public policy. Many authorities have been cited in support of this position, the principal of which are, Winch *v.* The Railw. Co., 13 Eng. L. & Eq. 506; S. Y. R. Co. *v.* Great N. R. Co., 19 Eng. L. & Eq. 513; Beman *v.* Rufford, 6 Eng. L. & Eq. 106; The S. & B. R. Co. *v.* The L. and N. W. R. Co., 21 Eng. L. & Eq. 319; Troy and 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

and further provided, * that the deed of the trustees upon such sale, should convey to the purchasers " all the real and personal

nature inconsistent with their being assignable. Peter *v.* Kendall, 6 B. & C. 703; Com. Dig. Grant, C.

" Whether, when they have been granted to a corporation created for the purpose of holding and using them, they may legally be mortgaged by such corporation, in order to obtain means to carry out the purpose of its existence, must depend upon the terms in which they are granted, or in the absence of anything special in the grant itself, upon the intention of the legislature, to be deduced from the general purposes it had in view, the means it intended to have employed to execute those purposes, and the course of legislation on the same or similar subjects; or, as it is sometimes compendiously expressed, upon the public policy of the state. There is nothing in the particular terms of the grant of these franchises to the Sullivan 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, 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

estate, named in said * mortgage-deed, together with all the rights, franchises, powers, and privileges in relation to the same,"

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 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

which the corporation had, at the * time of the mortgage, and that the purchasers should thereby * acquire " all the rights,

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 Vayne *v.* Hanham, 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 personality, which increased the difficulty of ordering a strict foreclosure; but that, as well as the existence of the power of sale, was held to be insufficient to confine the mortgagee to an exercise of the power of sale contained in the deed. I think the true distinction is taken in Jenkin *v.* Row, 11 Eng. L. & 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* 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

* 583, 584

franchises, powers, and privileges, which said corporation possessed, and the use of said railroad, with all its * property and

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; Newberg 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 for the benefit of a *cestui que trust*, I apprehend that the question whether the *cestui que trust* ought to be made a party, depends on the purpose of the trust. If the trustee is the proper party to receive and continue to hold the money for the benefit of the *cestui que trust*, so that the object of the suit is merely to reduce the trust fund to possession, that the trustee may hold it in trust, the *cestui que trust* is not a necessary party. For I take the general rule to be, that to a suit by a trustee to obtain possession of a trust fund, the *cestui que trust* need not be made a party. See Calvert on Parties, 212 – 215, and cases there cited; Allen *v.* Knight, 5 Hare, 272. But where a trustee is interposed between a lender and borrower, merely for the purpose of enabling the lender to obtain payment through the exercise by the trustee of powers conferred on him by the mortgage, and the lender is the proper party to receive the money, he should be made a party to a bill for foreclosure. It is in truth between him and the mortgagor that the account is to be taken, and he ought to be before the court for the purpose of taking the account, as well as to receive the money if paid. See Story, Eq. Pl. sec. 201.

"But this requirement of the presence of the *cestui que trust* must give way to the absolute impossibility, or even to the excessive inconvenience of complying with it; and the case at bar undoubtedly presents an instance of such excessive inconvenience, if not absolute impossibility. The bill shows that the number of different bonds secured by this mortgage was seven hundred and five, amounting

rights of property, for the same purposes, and to the same extent, that said corporation could use the same, if said deed * had not

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 bond holders parties in behalf of themselves and all others. The trustees are competent (Powell *v.* Wright, 7 Beav. 444), and it is their duty to represent all. The deed so treats them. In the cases of a sale, or possession taken of the road for 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. sec. 207 *a.*; Williams *v.* Gibbs, 17 How. 239; Gooding *v.* Oliver, Ib. 504. It was stated at the bar, that the Supreme Court of Massachusetts came to this same conclusion in reference to parties in Shaw *v.* Norfolk 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 en-

been made, subject to the same liabilities as to the use of said railroad, that said corporation would be under, if said deed

gines, 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 Commonwealth. They cannot exist under our statute, which provides that when the condition of any mortgage of real estate has been broken, the mortgagor and his assigns may redeem the same at any time before a legal foreclosure has been effected. Rev. Stat. 107, § 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, ch. 175. The deed of indenture contains in itself all the provisions, and has all the characteristics of that species of conveyance. It conveys an estate in fee to the grantees, to have and to hold the same

* had not been made, and that the directors should have power, notwithstanding the mortgage, to sell and dispose of any of the

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. R. 493; Nugent *v.* Riley, 1 Metc. 117.

"And neither the right conferred upon the grantees to take possession, upon the non-performance by the grantors of the stipulated conditions, of the whole of the mortgaged property and to manage and control it, and apply the net proceeds arising from its use to the purposes of the trust, nor the duty imposed upon and assumed by them to proceed, and take possession of the premises upon the 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. 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

* personal property of said corporation, provided they should purchase, with the proceeds thereof, other property to an equal

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 St. 372, is one 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 railroad 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,

amount, * which should be held by the trustees under the mortgage, in the same manner, as if the same had been owned by

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 semi-annually.

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 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.

the corporation, at the time of the execution of the mortgage, and specifically included therein."

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 endorsement 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 St. 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, 3 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 directors made a mortgage to trustees appointed under the act, conveying "the railroad of said corporation, together

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 judgments 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 encumbrance 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 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 R. 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 qual-

with all its powers, rights, franchises, and privileges, with all the lands, buildings, and fixtures thereto belonging, or which may

ity 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 railroad is not a prerogative franchise, and that a purchaser under a railroad 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. R. 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.

In Enfield Toll-Bridge *v.* Hart. & N. H. Railw., 17 Conn. R. 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. R. 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." . . . .

hereafter thereto belong, with all the rights, franchises, powers, and privileges now belonging to, and held, or which may here-

"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 railroad mortgage to sell the railroad, is a ratification of the mortgage, so far as the state or public is concerned. Richards *v.* Merrimack & Conn. River Railw., 44 N. H. R. 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 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.

after belong 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 corporation." 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 mort-

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. R. 127; Chapin *v.* Vermont, &c. Railw., 8 Gray, 575.

Property purchased of a railroad corporation at a mortgage sale is not liable to the debts of the original corporation. Vilas *v.* M. & Pr. du Chien Railw., 17 Wisconsin R. 497. See Smith *v.* Ch. & N. W. Railw., 18 Wisc. R. 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. Since 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. Id. See also Atkinson *v.* Marietta & Cincinnati Railw., 15 Ohio St. 21.

[24] See to same point Coe *v.* McBrown, 22 Ind. R. 252; Pennock *v.* Coe, 23 Howard (U. S.), 117.

gage, against subsequent mortgagees of the specific property, so acquired.

* 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.[25] And in the same case it was held, that where the road

[25] 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. R. 461. The rule of law, which forbids the 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. R. 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 & 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

was built, and most of the property of the company was acquired, subsequent to the execution of the mortgage, although

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 community, 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

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.

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 the 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 are expressly mortgaged, without them. It is remarked by Mr. Dane, in his Abridgement (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

And in the State of New York, where the legislature provided that railway corporations may, from time to time, borrow such 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,

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. R. 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 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. R. 193; Farmers' Loan, &c. Co. *v.* Commercial Bank, 11 Wisconsin R. 207. See *post*, n. 31, 32. 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.

executed a mortgage of their road, constructed and to be constructed, together with all and singular the railways, rails, etc., 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]

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, etc., 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

[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. R. 121.

[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.

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 desiring 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 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]

[29] Parish *v.* Wheeler, 22 N. Y. Court of Appeals, 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.

[30] And in Nichols *v.* Perry Patent Arm Company, 3 Stockton 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

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]

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 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 *bonâ fide* possessor

The case does not show whether the mortgage was executed by virtue of a power conferred by the legislature. But it is be-

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.

" 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

lieved the general statutes of Ohio allow such contracts, and the opinion certainly confirms the general views we have taken upon

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 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 bondcreditors 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

the subject, both as to the extent and the form of the remedy; and in both particulars it receives strong confirmation from the

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. R. 459; Bank Commissioners *v.* Rhode Island Central Bank, 5 Rhode Island R. 12.

In the case of Ludlow *v.* Hurd, 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.

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

elaborate and thorough opinion of Mr. Justice *Curtis*, which we have given in note (22) of this section.

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 encumbrance 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. R. 484, have decided the direct question before us, though the case is somewhat involved. In New Jersey, Willink *v.* Morris Canal and 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.* Winston, not yet reported, but of the opinion in which a copy has been furnished to us, 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.

"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.

In regard to the bill being brought in the name of the trustees, without joining the bondholders, there can be, we think, no just

"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 and 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. R. 596; in Kentucky, in Winchester and Lexington Turnpike Company *v.* Vimont, 5 B. Monroe, 1.

"In Ohio the point was fully examined and decided in Seymour *v.* Milf. and Chillicothe Turnpike Company, 10 Ohio R. 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.'

"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 re-

ground for any difference of opinion upon the proper application, of the most familiar principles of equity law.

In regard to the right of foreclosure, that must depend upon

garded 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 exist, 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."

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 R. 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 anything 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 mort-

northern district of Ohio, before the same learned judge, the following points were decided, wherein the same questions to some extent are further illustrated.

gaged; and 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 R. 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 rea-

A mortgage given on the entire property of a railway, including future receipts for transportation, with an agreement that

sonable certainty, the mortgage could not be specifically enforced. But as this 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 a 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.

property on the road subsequently acquired shall be bound, and a conveyance of it duly be executed, gives an equitable lien on

"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 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. R. 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 equi-

property subsequently acquired, to the bondholders of bonds secured by the mortgage.

table 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 separated 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 or 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 Rep.; 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 everything 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 Michi-

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 rail-

gan, it was held recently, 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 recent case in Pennsylvania, in which it was further decided that where there is a question in the case whether 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 St. 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. R. 193.

And see Coe *v.* McBrown, 22 Indiana R. 252; Farmers' Loan & Trust Co. *v.* Commercial Bank, 15 Wisconsin R. 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 railroad, 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 encumbrance. Stevens *v.* Buffalo, &c. Railw., 31 Barb. 590.

way, if he deliver the stock to the company without any special provision therefor, can claim no lien on the work. 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 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 anything, 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 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]

[34] Furness *v.* Caterham Railw. Co., 25 Beavan, 614, 619.

[35] Dunham *v.* Cin. Peoria & Ch. Railw., 13 Railw. T. 339.

SECTION II*a*.

Opinion in case of Knapp and Miller v. *Rutland and Washington Railway.*

I. *As between debtor and creditor these questions would be of entirely different consideration.*

II. *But all* bonâ fide *creditors stand upon equal equity; and a prior right among creditors must rest upon some legal advantage, fairly gained.*

III. *In this view the defects in the plaintiff's legal claim are numerous, and of a very marked character.*

It professes to be a mortgage of the real estate and franchises of the corporation without any action of that body, but through the agency of the directors merely. This cannot be maintained in law.

1. *Because the title resides in the corporation alone, and can be conveyed only by the corporate action, in conformity with its charter and by-laws, and the general laws of the state.*
2. *All corporate franchises, and especially those of railways, are strictly personal and inalienable.*
3. *This is a question of capacity and power in the corporation to make the deed, and may be raised by any one having an interest in it.*
4. *Such an act, being* ultra vires, *is not susceptible of confirmation by any subsequent acquiescence of the corporation, either express or implied, or by any general act of the legislature.*

IV. *Creditors are only affected by the registry of a valid mortgage, or knowledge of its existence.*

1. *The fact of an entry in the books of the company, that the bonds were delivered at a time subsequent to the statute, is not proof of the fact, and if the fact were proved, it could not affect subsequent* bonâ fide *encumbrancers, since it does not appear upon the registry.*
2. *An instrument deficient in the statute requirements not entitled to registry, and not, therefore, constructive notice.*

V. *There was not only a defect of power in the corporation to execute the deed; but there is an entire want of any proper* action *of the corporation.*

1. *It is not done in the name of the corporation, and does not therefore profess to be their act.*
2. *There is no pretence of any action of the corporation, but only of the directors, which is as absolutely incompetent as if it were the act of a single stockholder or director.*
3. *The expression "all the business of the company," does not enlarge the ordinary powers of directors. It is not the proper business of a corporation to assign all their franchises, or even all their property. That would be to* annihilate *and not to "* transact *their business."*
4. *Directors of joint-stock companies have no such power, as has often been decided.*

VI. *This attempt to convey the real estate of the corporation by a vote of the directors is in direct conflict with express provisions of the general statutes.*

1. *It has been expressly decided that the general provisions of the statute as to the* mode *of conveying real estate are exclusive.*
2. *So also that the vote of the corporation is indispensable to create the power to do so.*

VII. *The addition to the name of Merritt Clark, of "President"; and of the name of the corporation, is a mere* descriptio personæ; *and would not render the deed binding upon the corporation, even if Clark had authority to bind them.*

VIII. *The effect of the seal of the corporation being attached to the first mortgage.*

1. *It is attached to the paper in such a place, at the very top, as not to indicate it was done as an act of execution.*
2. *Sealing never held equivalent to signing.*
3. *The proof shows that the seal was attached after the execution of the instrument.*
4. *If it is regarded as any portion of the instrument, it will avoid it, as a material alteration.*

PART II. *Notice in fact may be relied upon by the plaintiffs.*

DIV. IX. *There is no evidence of notice in fact, except by Miller and Baldwin. These cannot avail against the bondholders under the second mortgage.*

1. *These bonds are negotiable instruments, and pass an absolute title by delivery.*
2. *The notice to Baldwin was not valid for any species of contract. It was more calculated to put him off inquiry than no notice at all.*
3. *The fact that Miller had been trustee in a former mortgage, if a valid one, could be no notice to the* cestuis que trust *under the second mortgage, even if the securities were not negotiable.* 1. *He was a mere agent.* 2. *All the notice to him was acquired in a different transaction.* 3. *The fact that he retained* $250,000 *of the bonds* secured *by this mortgage for the benefit of the first bondholders, not* secured *at all, showed that* he *even was not attempting to gain any fraudulent advantage.*
4. *But notice to all the trustees will not aid the plaintiffs.*

X. *The claim to have the contract reformed, and for specific performance and a foreclosure, is not maintainable.*

1. *Because of the intervening rights of other* bonâ fide *encumbrancers.*
2. *This will be to* supply *a power, instead of* aiding *a defective execution of one.*
3. *The lapse of time and acquiescence of plaintiffs is an invincible obstacle to such a decree.*
4. *There is no such notice in fact to the subsequent encumbrancers, or even to Miller and Baldwin, as to justify a court of equity in interfering in any way.*

XI. *Some reliance is made upon the fact of having obtained the indorsement of good counsel.*

1. *This cannot render an invalid instrument operative in law.*
2. *The* omission *to obtain proper advice may operate against a party.*
3. *The advice was rash if it was given.*
4. *This may not fairly justify any inference of bad faith in the bondholders, but it shows very clearly that those who executed the mortgage were* not *solicitous to have it valid, provided it did not bind them personally.*

XII. *The position of affairs called for despatch and some reserve.*

1. *Because the stockholders had subscribed under an assurance that* no *mortgage would be given.*
2. *The fact that the mention of any such mortgage has been studiously kept out of the written reports to the stockholders, shows reserve in fact.*
3. *The fact that the officers volunteered to get up this first mortgage, for the benefit of the contractors merely, is reason enough for reserve as to stockholders.*

4. *All the circumstances go to show that it was regarded as a temporary expedient by the officers of the company.*

5 and 6. *If the officers of the company or the bondholders believed in the validity of this contract, it was attributable exclusively to their* studious reserve *in regard to seeking* thorough counsel, *which is scarcely less than gross negligence, if we can fairly believe that it occurred altogether in good faith.*

XIII. *Under such a lame show of equity on the part of the plaintiffs, it would be going further than any case has ever gone to postpone the claim of those who appear throughout the transaction, in all their connection with it, to have acted in the utmost good faith.*

§ 235 *a*. 1. THE following opinion, although not adopted by the court, will be found, we think, to contain sound views, and such as are in consonance with sound principle and established precedent, and such as must ultimately prevail. The idea upon which the court proceeded,[1] in setting up a contract as a valid

[1] Miller *v.* R. & W. Railw. Co., 36 Vt. R. 452. We have thought fit to add the statement of the case and the opinion of the court at length.

The Rutland and Washington Railroad Company, chartered in 1847, surveyed and located a railroad, and put it under contract for its entire completion, including land damages. The contractors were to receive in payment shares of the capital stock at par for all but $ 100,000, which was to be paid in money. They proceeded with the work, and when it became necessary to procure rails, the capital stock was found insufficient. Thereupon the directors voted to modify the contracts by issuing $ 250,000 in bonds, to procure the necessary iron, to be secured by mortgage of the road and its franchises, which bonds the contractors were to receive instead of an equal amount of stock, it having been ascertained that the bonds would be received for the iron; and the purchase was negotiated by one of the directors. The bonds and mortgage were authorized by votes of the directors, and M. Clark, president of the company, was appointed their agent and attorney to execute the mortgage, and authorized to give any further assurance and contract that might be proper. In the first annual report of the directors, made in 1851, they referred to the fact that these bonds were issued pursuant to the recommendations of stockholders, and that the iron necessary had been purchased with them. This report was presented and read by the president, and accepted by the stockholders. They were again referred to in the report of the directors of 1852, also accepted by the stockholders. Subsequent to this, in 1852, the corporation issued $ 550,000 of other bonds, and secured them by a mortgage of the road and the franchises and property belonging to it, $ 250,000 of which were designed by the parties to the transaction to be used in retiring the first mortgage, and the remainder in paying the other indebtedness of the company. The first mortgage bondholders did not assent to this arrangement. Miller, one of the trustees of the first mortgage, was also one of the trustees of the second. Authority to make the exchange was given to the president by the directors, and afterwards by a vote of the

mortgage of the road and its franchise, where it was not in form a mortgage, and not in the name of the corporation, is so

stockholders at a meeting in 1853. In 1858, the railroad company leased their road to one Canfield for the yearly rent of $ 70,700. Of this $ 16,000 was made payable to the first mortgage bond- or note-holders, for their annual interest. In 1855, the corporation made another mortgage, securing $ 1,300,000 other bonds, intended to retire both the former issues, and also to pay any other indebtedness of the company. Those secured by the first mortgage declined this arrangement also. The first mortgage, made by Clark, in pursuance of the authority given by the directors in 1850, after reciting the votes, proceeded as follows: —

"Know ye, therefore, that I, Merritt Clark, as I am the President of said company, as well by the power and authority vested in me by the vote aforesaid as in consideration of the sum of two hundred and fifty thousand dollars, to the use of the said corporation, well and truly paid, the receipt whereof is hereby acknowledged, do by these presents give, grant, bargain and sell unto the said trustees and their successors (to be by themselves nominated and appointed) the premises hereinabove and in said vote mentioned. To have and to hold the said granted and bargained premises to them the said trustees, their heirs, assigns, and successors forever, to their own use.

"And I, the said Merritt Clark, do hereby covenant to and with the said trustees and their successors that I am duly authorized and empowered to sell and convey the said premises to the said trustees in manner and form aforesaid, and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said Miller and Knapp, trustees, their heirs, assigns, and successors, against the said corporation and all persons claiming from, by, through, or under me, the said Clark, but against no other persons."

The deed was conditioned to become void on payment by the corporation of the principal and interest of the $ 250,000 in bonds, and was signed and sealed by Clark in his own name simply. The acknowledgment was as follows: —

"Then personally appeared the above-named Merritt Clark, the President of the above-named Rutland and Washington Railroad Company, and acknowledged the above instrument to be his free act and deed and the free act and deed of the said corporation."

A certificate was also appended, signed by *Pierpoint* and *Williams*, attorneys at law, and Ch. *K. Williams*, attorney at law, that the deed was drawn in proper form and duly executed.

Barrett, J. "Had the corporation legal competency to pledge its credit for the procurement of rails for its road, and to secure payment by a mortgage?

"It is now to be regarded as settled beyond any proper ground of question that a corporation may contract debts necessary for the due performance of the objects of its creation, and may give valid security for their payment by the pledge of any property or interests in property that are subject to its disposal, by virtue of the implied power existing in it, and without any express provision of statute to that effect, provided it be not restricted by statute in this respect.

utterly in defiance of all just principle or sound precedent, that to its maintenance it will become necessary to disregard and sub-

The case of the Vermont & Canada Railw. *v.* Vermont Central Railw., Vt. Sup. Ct. Jan. 1861, referred to in the argument, does not fall within this proposition; for in that case the transaction in question was a contract of leasing for the payment of a stipulated rent, and of security for the payment of the rent, a transaction not within the express or implied powers of the two corporations till made so by statute. In the present case, the end and purpose of the creation of the corporation was the making and operating of a railroad. It was necessary to such end and purpose that the company should have rails as well as a road-way. It was competent for it to contract for their purchase, and to provide by proper means for the payment therefor. If it had not the money, it was competent for it to obtain credit by the pledge of its disposable rights and interests in property.

"The rails were purchased in the due course of business, and the obligations, called bonds, of the company were made and delivered in payment, purporting to be secured by a mortgage of the road and its franchises. And this was done in pursuance of an agreement on the part of the company that the bonds should be so secured, and they were received upon the assurance, made by the representative agents of the company, that they were so secured, by an instrument designed to be executed in pursuance of a vote of the directors authorizing the issue of the bonds and securing them by mortgage, and authorizing the president, as agent of the company, to make such mortgage, accompanied with the opinion of eminent legal counsel that said instrument was valid as a mortgage of the corporation.

"It is satisfactorily established by the evidence that the directors, with the knowledge and concurrence of all the stockholders, designed that the mortgage should be given, and that Mr. Clark, the president of the company, designed, in executing his agency in that behalf, to make and execute a mortgage which should be the deed of the corporation. It is also established that the corporation had no money, and no means otherwise wherewith to pay for or secure the payment for the rails. The rails thus acquired were used by the corporation for the completion of its road.

"The intervention of the contracts for the completed construction of the road, including its rails, with the modification of them as shown by the proofs, does not vary the legal or equitable aspect of the case, upon the question of the security claimed to have been given by the corporation for the bonds first issued.

"In the transaction of negotiating for the rails and other like things, and providing for the payment, the corporation would act through the directors as matter of course, under the express terms of § 6 of the charter, that 'five directors shall form a board, who shall be competent to transact all the business of the company.' See Bank of Middlebury *v.* R. & W. Railw., 30 Vt. R. 159.

"There is no question as to the legal formality with which the directors acted in the present case. If, however, it was to be held that for validity the acts of

vert most of the law before established upon the point. But we desire to acknowledge the great learning and ability with which

directors in this behalf must depend upon authority conferred by the corporation, we find ample ground for holding such authority to have been conferred, in the fact of the knowledge and concurrence of the stockholders in all that transpired, while the matter of issuing and securing the bonds was in progress, and in the repeated acts of ratification afterwards; especially in what occurred at the meetings of stockholders in 1851 and 1852, when the directors made their annual reports; as well as in what occurred in connection with, and as part of the transaction of making the second mortgage, in the latter part of the year 1852, and the lease to Mr. Canfield in 1853, and the third mortgage in 1855; in all which the existence of the first mortgage and of the bonds secured by it was recognized, and in no way repudiated, by the corporation. The principle is undoubtedly sound, as stated in Redfield on Railways, § 235, pl. 11, (vol. 2, p. 513) that 'when the company receive benefit upon money borrowed, they cannot avoid liability upon the mortgage given to secure its payment by denying the authority of those who contracted the loan in their behalf;' and the pertinency of its application to the present point is obvious. Noyes *v.* R. & B. Railw., 27 Vt. R. 110.

"In Curtis *v.* Leavitt, 15 N. Y. R. 47, the language of *Comstock*, J., is to the same effect. 'When a person receives and appropriates the benefits of a transaction done in his name and by his assumed authority, there exists the highest evidence of his approval. . . . . These rules are elementary, and are grounded on the simplest ideas of justice in the dealings between men. They are also as plainly applicable to corporate as to other transactions, where the dealing is within the powers of the corporations. In such a case, no possible reason can be presented why a corporate as well as a private person is not bound by the dealings of its agent which it has approved, and the benefits of which it has received and appropriated.' On page 49 he says, 'But corporations, like other principals, may act and be bound in any of the modes not opposed to the general rules of law applicable to such bodies. They may previously resolve, they may subsequently acquiesce, they may expressly ratify, they may intentionally receive and appropriate the proceeds of the unauthorized transaction, and thus put it out of their power to dispute the validity.' *Brown*, J., on pages 136 – 138, expresses the same views.

"It is understood, of course, that this could be applicable only in case of transactions such as the corporation could lawfully become a party to, and not to transactions in violation of corporate rights and duties, such as would be void, and could impose no liability.

"If it were doubtful whether the corporation had the right, by virtue of its inherent capacity, to issue the bonds and make provision for them by way of mortgage, we think the act passed Nov. 9, 1850, should be regarded as operative to confer the right, and as effective upon the transaction in question. Section 1 of that act is, 'Every railroad corporation within the state shall have power to issue notes or bonds for the purpose of building or furnishing their

so startling a proposition is maintained in the opinion of the court.

roads, or paying any debts contracted for building or furnishing the same, bearing such a rate of interest not exceeding seven per cent, and secured in such a manner as they may deem expedient.'

"It is true that the vote of the directors, authorizing and providing for the issuing of the bonds and the making of the mortgage, and the execution of the instrument by Mr. Clark as president and agent, were prior to the passage of the act. But we find from the evidence that the bonds were not issued so as to become operative and obligatory as contracts upon the corporation until the month of February next after. Of course the security did not become operative until the debt had existence. It was but a mere incident of the debt, and was of no force and effect till the delivery of the bonds.

"It must be assumed as beyond doubt that the transaction, by the authorized agents of the corporation, of delivering these bonds, thus secured, in payment for the rails and for their transportation, was regarded by the corporation to be warranted by lawful authority, either as existing inherently in the corporation, or as conferred upon it by the legislature; and if it was so, neither the corporation nor any one standing on rights subsequently derived from it, can impeach the validity of the transaction in this respect.

"The question then arises, is the instrument, executed by Mr. Clark in consequence of the votes of the directors, the deed of the corporation? As to this, we think the authorities firmly establish the negative. Though it was designed by him as such agent, as well as by the directors in voting the mortgage to be made, that it should be the deed of the corporation, and though that design is fully evinced by the face of the instrument itself, still it is affected by technical difficulties of form and mode, that prevent it from being, in point of law, the deed of the corporation. The authorities cited by the counsel for the defendants are uniform and conclusive upon this point, and are not met or countervailed by the books and authorities cited by the counsel for the orators. This being so, the recording of the instrument did not constitute constructive notice of its existence and contents.

"The next question is, can the orators stand in a court of equity, on the ground that the transaction, as it was, operates in their favor as an *equitable mortgage*, to the intents and purposes designed, but which failed of being accomplished by the instrument that was executed?

"As between the mortgagee and the corporation, and aside from any technical impediments, the ordinary sense of justice would at once prompt an affirmative answer. The corporation and its administrative agents designed to make a valid instrument of security on behalf of the corporation, and supposed that they had done so. They issued the bonds in payment for and obtained the rails upon that design and supposition. The rails were sold and delivered, and the bonds received in payment, upon the same supposition, and with what seemed a most reliable assurance that it was verily true and well-founded. The rails were used by the corporation in the completion of its road, thus at the same time af-

2. At the instance of those who represent, as trustees, the interests of the mortgagees and other creditors of the company, I

fording a most indispensable element in its construction, and adding so much to the value of its property, and for use in carrying into effect the end and purpose of its existence.

"Assuming, then, that the corporation had power to issue bonds and to secure them by a mortgage, and that the directors were the proper agents of the corporation in this behalf, and that their acts to this intent were properly authorized, how are these acts, including what was done by Mr. Clark, to be regarded in connection with the fact, that the corporation has received and used the rails, as giving the orator an equitable right to the designed security?

"It seems to us the contract was one which the *corporation* were bound by, that is, the bonds are obligatory as a debt against the corporation, and that the contract as to the security is equally obligatory, unless some technical difficulty intervenes.

"Wherefore it is insisted that the statute of frauds has not been answered by what was done. Waiving any discussion as to what was the effect of the delivery and receipt and use of the rails, and the delivery of the bonds in payment, under a contract that they are to be secured by mortgage, we regard the action of the directors, by their formal and recorded votes, as tantamount to a memorandum in writing sufficient to answer the requirements of the statute. It constitutes evidence of the highest character, as against the corporation, of the agreement to give the designed security. We also regard the deed itself that was executed by Clark, taken in the light of the recitals, as also evidence of the highest character as to the contract to give such security. It is true that by the strict rules of law, this instrument is not to be regarded as the deed of the corporation. If it were to be so regarded, the orators would stand upon a technical and valid mortgage at law. But that it is not so, is because it lacks efficacy to convey the real estate, not by reason of any want of any power in the corporation, nor for want of any authority in Clark, nor for want of any intention on the part of the corporation or of Clark to make an instrument that should convey the legal estate, but because Clark mistook the proper technical formalities and mode of making such an instrument. We do not fully understand the ground or purpose of the remark that 'the private intention of Clark to make a mortgage against the company is of no avail, if it cannot be carried out by the rules of law.' If it be meant that the mortgage failing as to its technical sufficiency, to constitute a mortgage at law against the company is of no avail for any purpose, we think it unfounded in principle and unsustained by authority. If it be meant that the act of Clark, merely in pursuance of his private intention, would not affect the company, we assent to it; but this does not meet the point, for it appears on the face of the instrument, together with the votes of the directors, that he was authorized to make a mortgage that should technically convey the estate; that his agency in that behalf was for that very purpose, and that in what he did his design was to effect the purpose of his agency. We think this intent is 'so manifested as to give it legal validity,' in the language of the brief;

have prepared the following opinion, as the best response I could give to their request for " my impartial opinion upon the

not as a technical mortgage, operative to convey the legal estate, but as evidence as to the contract in writing, that at the same time satisfies the requirements of the statute of frauds and furnishes ground for asserting an equitable right in and to the security contracted to be given. The case differs widely from that cited from Ambler, 495, to show that Clark's agency was ministerial and must be strictly pursued, and unless he in fact made a mortgage valid in every legal requirement, what he did is of no effect, even as evidence, to affect the equitable rights and duties of the parties. In that case, the agent was empowered to sell at auction, but in fact sold at private sale, thus departing entirely from the scope of his agency. In this case, Clark was authorized to make a mortgage, valid at law to convey the legal estate. Acting within the scope of his agency, he came short of doing so, by reason of mistake as to certain technical requisites. Though he thus came short of accomplishing the purposes of his agency, it would require a new rule, both at law and in equity, to hold as nugatory, to every intent, what he thus did, even as evidence.

" In what is thus said, it is evident that the case of Parish *v.* Cooms, 1 Pars. Eq. 89, furnished to the court in manuscript, is not applicable to the present, on the point of the authorization of the agent to make, on behalf of his principal, such a note or memorandum in writing as is required by the statute of frauds. In that case, there was a mere parol authorization, and it was held to be invalid under the statute of frauds. In connection with these remarks, it is appropriate to observe that the court do not adopt the views of counsel in another point, viz., 'that this being the sole, private act of Clark, cannot be controlled by parol in equity any more than at law, unless upon the ground of fraud or mistake.' We think that the contract was that of the corporation, but the instrument was so drawn and executed as technically not to make it legally operative as a specific mortgage of the corporation. This was owing, not to any mistake on the part of the corporation as to matter of law, for they intended and fully authorized Clark to make a valid mortgage, but wholly owing to a mistake on the part of the agent of the company as to the mode of adequately executing his agency. The corporation intended he should make an instrument that should be technically their deed. He, by mistake, made one that technically could operate only as his deed. The corporation, as such, did not pass judgment upon the legal quality of the instrument. The agent, under the authority conferred, executed and delivered it. This we regard, not as a mistake in matter of law by the corporation as to the meaning and operation of the instrument that was executed and delivered, but as a failure on the part of the agent adequately to perform the office and purpose for which he was appointed. Hence we have no occasion to discuss the question whether, for mistake in matter of law, a court of equity will grant relief. In this connection it is further to be remarked, in view of what has been already said, that this is not, in our apprehension, a case in which 'the court is called on to reform a written instrument on the ground of mistake, by parol evidence merely, and thus in effect to repeal

questions in dispute, whether that opinion shall be for or against us."

the statute.' As before said, we think the face of the instrument shows clearly itself that it was designed to be the deed of the corporation; and all the recorded proceedings of the directors in this behalf, in pursuance of and to carry out which this instrument was made, show clearly the same thing. The instrument and these recorded proceedings constitute reliable *criteria* whereby to determine in what respects, and to what intent, the instrument should be reformed, if such reformation is necessary as a means of enabling the orators to secure their rights through the intervention of the court in this respect. It also gives point and application to ancillary parol evidence, in such a manner as to preclude the hazard of being misled by it.

"In pursuance and as the result of these views, it is clear, upon familiar and unquestioned principles, illustrated by very many adjudged cases, that as between the orators and the corporation the transaction, as found by the court, entitles the orators, in equity, to have the security which it was within the power of the corporation to give by virtue of the proposed mortgage, that it constituted an equitable mortgage to the same intents as a mortgage answering the technical requirements of the law.

"It is now to be considered how the rights of the orators stand in relation to the second and third mortgages.

"We assume for the present that subsequent grantees take and hold the estate conveyed, subject not only to all legal encumbrances to which it was subject in the hands of the grantor, but to all equitable encumbrances of which they have notice. A case in point, as propounding and applying the principle, is Sumner *v.* Rhodes, 14 Conn. R. 135.

"The court are convinced by the evidence that all the trustees under the second and third mortgages, prior to and at the time such mortgages were executed and they became trustees, had notice and knowledge, in point of fact, that the first bonds had been issued, and that the same were secured by mortgage. All the circumstances and reasonable probabilities concur with the direct evidence, and leave no doubt of the fact. This being so, they stand chargeable with the legal consequences of the right, whether legal or equitable, which existed in virtue of the issuing of such bonds, with such security in the way of mortgage as appertained to them; and that, too, even though it were to be held that the validity of that security depended upon acts of the corporation prior to the making of said second and third mortgages, by way of recognizing and ratifying the act of the directors in the transaction constituting the creation of the security, and even though the trustees under the said mortgages had not in fact knowledge of these acts.

When they had notice and knowledge of the issuing and existence of the bonds, and of their being secured by mortgage, if the fact existed, it had full operation and effect to subject the title which they took with such notice and knowledge of the fact to the legitimate consequences of the fact.

"The bonds, immediately upon being issued, having been received in payment

In doing this I have endeavored to possess myself of all the facts in the case, and the points of argument, and the authorities

for the rails, thereby became effective in the hands of the holders, with the full right vested in them for the security provided in that behalf; and it was not in the power of the corporation, or of any of its officers, without the concurrence of such holders, to divest or affect that right by any act of theirs thereafter; so that whatever was said or done by or in behalf of the corporation, through its officers, in respect to other bonds and mortgages as affecting the rights of the holders of the first bonds, or by way of making other provisions for the debt evidenced thereby, was entirely nugatory as against the holders of the said first bonds. They stood upon fixed and vested rights, over which the corporation had no control, except by paying said bonds. It makes no difference as to the rights of said bondholders what provision was made in this respect, either by means of or under the second or third mortgage, or whether the corporation or its officers acted in good faith or not in making and administering such provision.

"It is now to be considered how such notice and knowledge on the part of the trustees under the second and third mortgages affect the title they hold, in view of the relations they hold to the bondholders under said mortgages respectively.

"In Pierce *v.* Emery, 32 N. H. R. 484, 521, Ch. J. *Perley* says: 'Notice to trustees who take a conveyance merely for the purpose of upholding an estate, without having any connection with the title, is not always, nor perhaps usually regarded as notice to the *cestui que trust*. But the trustees under this act must be regarded in the light of agents for negotiating the loan; they act for those who lend their money on the security of the mortgage; they are charged with the duty of representing the interests of the bondholders, who are unconnected individuals, having no ready means of acting together except through the trustees, whom the law appoints to act for them. Notice to the trustees would be all that could be given in this case.'

"It is well settled, as is said in Hill on Trustees, p. 513: 'Notice, either actual or constructive, will be equally binding, whether it is given directly to the party himself, or to his agent, solicitor, or counsel.'

"We think both upon principle and from a due regard to what alone is practicable in such a case, that notice to trustees should be held to affect the title in their hands with reference to all rights in respect thereto under the trust. Though it is obvious and readily conceded that bondholders acquire their rights, in reference to the security provided by the mortgage in trust, by the purchase of the bonds, and with such purchase the trustees have no connection, nor any agency in reference to the transfer thereof, yet it is at the same time true, that in reference to the security for holding, administering, and enforcing it, according to the provisions of the trust, the trustees are the agents of the parties interested and entitled by reason of being bondholders. We are unable to assent to the proposition that the trustees are only the agents of the *cestuis que trust* for the purpose of holding the legal title. They are agents for holding just such title as is created by the transaction, and for administering it according to

relied upon, on both sides, as far as was in my power. And while I do not claim for my views any higher character of impar-

the terms of the trust, and whatever title the *cestuis que trust* have, whether legal or equitable, is through and by reason of the title conveyed to and held by the trustees. Even if it should be granted that the trustees were agents for the purpose merely of holding the legal title, still, as the rights of the *cestuis que trust* depend upon and are to be asserted through that legal title, whatever effects such legal title in its creation in the trustees must affect the rights and interests that are dependent upon it. If the legal title is charged with an encumbrance in its creation in the hands of the trustees, it is difficult to see how the *cestuis que trust* can have an equity suspended from that legal title, that shall override such encumbrance. However that might be as a proposition applicable to a dry trust, still, as to a trust which, in addition to holding the title, is administrative of the property for the purpose of effectuating the security, the trustees must be regarded as the agents of the *cestuis que trust* with reference to all their rights and interests, both in the title held and in the administration and fruits of the trust, according to its terms and legal operation. In Sturges & Douglas *v.* Knapp *et als.*, 31 Vermont R. 34, it was held, that a mortgage by a railroad company, where the only trust expressed was to hold the property to secure the payment of the bonds named, created an active administrative trust, even after a foreclosure, under which the trustees were authorized to make a lease of the road and property for ten years, against the protest and remonstrance of a large majority in amount of the bondholders, though contrary to my own opinion. But it is the adjudicated law on the subject in this state. In the present case, however, the second and third mortgages provide specifically and in detail for the administration of the property after the conditions shall have been broken, for the satisfaction of the rights and interests of the bondholders under the mortgages. The fact that the bonds are negotiable, and pass from hand to hand like bank-bills, does not affect the question of the agency of the trustees in reference to the security provided by the mortgage. Such bonds purport to be secured by a mortgage in trust to trustees who are designated and known. They are negotiated and purchased on the credit of the security thus existing. That security consists in the title and property which exist in the trustees. By the purchase of the bonds the purchaser voluntarily adopts the security as it exists in the trustees, and becomes *cestui que trust* under them, thereby adopting said trustees as his agents for holding the existing title and administering the property held thereby to the intents specified in the creation of the trust. The question is not as to how *cestuis que trust* would be affected by notice to trustees of transactions which occurred subsequent to the creation of the trust, or to their becoming *cestuis* under the trust, but as to how they are affected by notice to the trustees, which, as to them personally, affects the legal estate in their hands at the time, and in the act of their becoming trustees.

"Then as to the practicableness of the contrary doctrine: The very fact that the bonds pass from hand to hand, and without any record or notice, and are changing hands every day to a greater or less extent, shows that the matter of

tiality than that of counsel desirous of learning and communicating the truth to my clients, for their guidance in the discharge

fixing an equity by notice would be practically impossible. It cannot be known in whose hands all or any considerable portion of the bonds are, nor in whose hands they will be the next day or the next month. Of course, the notice would affect only the party to whom it was given, as there is no joint interest or representative relation between the different holders of bonds. Nor would notice to a holder of specific bonds to-day affect a person who, without notice, should in good faith become the owner of the same bonds to-morrow. The result must necessarily be that, however well-grounded an equity a party might have against the corporation, and against the trustees personally, attaching upon the title held by the trustees, it would prove barren and futile to any beneficial intent, by reason of the impossibility of knowing and notifying the ever-shifting parties who have an interest and claim an equity subsequently created and subsequently accruing. On the other hand, it would be easy, comparatively, for persons desirous of investing in railroad mortgage bonds to apply to the trustees holding the security, and elicit the state of the title. We think it no hardship that they should be required to do so, if they would avoid the hazard of finding their security subject to a prior encumbrance, when it might be too late to save themselves from the consequences of such a state of the title.

"The only case that has been cited, or that we have been able to find, is Curtis *v.* Leavitt, 15 N. Y. R. Several of the judges drew up opinions. *Shankland* and *Paige* concurred with *Comstock* and three other of the judges in the result that the bondholders were entitled to the security in the hands of the trustees, those two putting it upon the ground that they were *bonâ fide* purchasers of the bonds, without notice of the defect in the manner in which said securities had been assigned to said trustees, one of whom knew of such defect; holding that the trustees were not agents of the bondholders, but only of the corporation making the assignment. The four other judges held the assignment itself to be valid, notwithstanding such alleged defect in the manner of making it, on the ground that it being within the scope of the power of the corporation to make such an assignment, and the corporation having received the benefits resulting from the issue and sale of the bonds, it had by its acts of recognition and ratification cured said defect.

"Judges *Shankland* and *Paige* cite no authority upon the point to sustain their view; and it was not one of the points decided in the case. The securities assigned were bonds and mortgages, to be held by the assignees, and the avails thereof to be held and applied as security and in payment of the bonds issued by the company in the manner provided in the instrument of assignment. We have no occasion to present any critical analysis and discussion of that case for the purpose of ascertaining whether the trustees and bondholders in that case sustained such a relation to each other and to the subject-matter of their respective interests as to constitute ground for the application of the same principle and rule as the case before us. For if it did, upon the views here expressed, we should regard the point held by Judges *Shankland* and *Paige* as

of responsible fiduciary obligations, I feel that such a position presents the very highest motives for research, watchfulness, and

unsound. But it is sufficient to say that it was not so decided in that case, and of course stands only as the individual views of the judges named.

" It is to be noticed that in what we have said as to the trustees being agents of the bondholders, we confined that agency to the purposes of the trust with which the trustees were clothed, namely, that of holding the title as security, and enforcing and administering such security according to the provisions of the trust, both express and by law implied. We do not hold, nor do we assent to the position taken in the argument by one of the counsel for the defendants, in reference to the $ 250,000 of bonds under the second mortgage, put into the hands of Miller with the design of having them appropriated in exchange for the first bonds, that the trustees have, under the trust, any agency to discharge, change, or compromise any security which they hold as such trustees. They are not general agents of the bondholders, but special, and limited to the legitimate purposes of the relation which they hold to the security and to the parties interested, under the trusts with which they are clothed. Any act or omission of theirs, therefore, whether in good or bad faith, outside the scope and purposes and incidents of the objects of the trusts, would not affect the interests of other parties under the trust, on the score of the agency existing in that relation.

" But it is insisted that the subsequent mortgagees cannot be subjected to the prior equitable encumbrance, unless the notice to them was such as to make it fraudulent in them to take and register said mortgages in prejudice to the known rights of the other parties. To the principle embodied in this position we have no difficulty in assenting; but we think that the impression naturally resulting from the manner in which it is put may not be precisely accurate. The notice which the law regards as sufficient to charge a subsequent purchaser is such as, if duly heeded and faithfully pursued, would lead to a knowledge in point of fact of the true character of the prior encumbrance, and thus charges him with the legal consequences of such prior encumbrance, however he may judge of the validity in point of law of such encumbrance, or of the legal consequences that may flow from it. By the fact of such notice being charged with a knowledge of such encumbrance, if it, in fact, existed, the law regards the taking of a subsequent conveyance, in prejudice to such encumbrance, as being in bad faith on the part of the purchaser, even though in truth he took the conveyance either in heedless disregard of such notice, or upon the supposition that the prior claim was invalid, or in doubt whether it was valid or not, and thought best to take his chances in that respect, and not with any wish or intent to defraud anybody. Indeed, the true idea of fraud, as involved in this subject, is not so much that there is fraudulent intent on the part of the subsequent purchaser in taking the conveyance, as that to permit it to be set up and enforced, as against the prior equitable title, would operate a fraud as against that title. This is the elemental idea of an estoppel *in pais* in its ordinary application, to which the principle upon which a subsequent purchaser is charged by a notice of a prior equitable title is strikingly analogous, if not precisely identical with it.

circumspection, that the opinions I form and express may be found warranted by the facts of the case and the established rules

"The next question is, had the corporation any right in the subject-matter of the mortgage, upon which the mortgage could lawfully be operative? It purports to convey the 'road and its franchises, the location, description, and survey of which has been duly made, &c.' It is not questioned, and is so conceded in the argument, that the right and interest of the corporation is so in the nature of real estate, or is such an interest in land, as might be the subject of conveyance by mortgage; but it is insisted that the corporation holds that right and interest so under and in the nature of a franchise for the public, as to be disentitled to make any conveyance of it. Much was said in the arguments, and much is contained in the books as to the incompetency of a corporation to make any conveyance or transfer of its franchises unless specially authorized to do so by act of the legislature. It is claimed and insisted that the franchise is conferred upon a particular body of men, constituting the corporation, implying a special confidence in them to answer the trusts in behalf of the public which constitute the consideration for the franchises, and that it is not competent for the corporation to disable itself from holding and fulfilling those trusts, either by disposing of its franchises or of the means necessary for the execution of such trusts. In order to make a practical test of the soundness and value of this proposition, it seems worth the while to consider the subject with reference to its actual elements.

"The end and object on the part of the public is primarily the same as that on the part of the corporation, namely, the construction and operation of a railroad, the results of which, as the next and most important consideration, are, on the one hand, serving the public interests and convenience, and on the other, the pecuniary emolument of the corporation. The former is the consideration upon which the corporation is created and its franchises conferred by the legislature; the latter is the inducement which leads individuals to become members of the corporation. It is necessarily implied as being in contemplation that the end of making and operating the road is to be attained through the use of such practicable means as are ordinarily resorted to in such enterprises. These are, first, money raised on subscriptions to the capital stock; second, money and materials raised on such credit as can be made available. If neither of these means prove effectual there is an end of the enterprise, both with reference to the public and the corporation. The present case is a clear illustration. The road was located and surveyed, and was in the process of being built, by means obtained through subscriptions to the capital stock. It was necessary to have rails. The capital stock could not be made productive of the means of purchasing them. The only resource left was such credit as could be obtained. The only means of obtaining such credit was by the pledge of such proprietary rights and interests as the corporation had, and they consisted only of the road and franchises. If these means could not be made available the enterprise was doomed to stop at a stage when neither the public could derive any benefit from it, nor anybody else, and when all that had been done would be outright loss and sacrifice to

of law applicable to the same. The case is unquestionably important, both in its principles, and in the amount in controversy,

everybody but the laborers who had got their pay. In this condition of affairs, did public policy, did the trust for the public benefit, reposed in the corporation as the consideration for creating it and clothing it with its franchises, require that the corporation should then come to an end, and its charter become forfeited?

"On the other hand, looking to the purpose to be served the public, viz. the serving of the public interest by the making and operating of a railroad, would not public policy, and the character of the trust reposed in the corporation in behalf of the public, rather require that the corporation should pledge such means as it had for a credit that would enable it to go forward with the enterprise to a successful result, in the reasonable and confident expectation of being able to redeem the pledge, and realize to the public and itself all the legitimate benefits of the undertaking? On the subject of public policy the legislation of 1850, of 1856, and of 1857 is quite significant. The act of 1850, authorizing railway corporations to issue bonds secured in such manner as they may deem expedient, has already been recited. In 1856 it was enacted, — 'Section 1. All mortgages of railroad franchises, furniture, cars, engines, and rolling-stock, when properly executed and recorded, shall be effectual to vest in the mortgagee a valid mortgage interest in and lien upon all such property without delivery or change of possession, and, for the purposes of mortgage, all such property shall be deemed part of the realty.' This is decisive that the legislature regarded it as competent and proper for railway corporations to mortgage franchises as well as tangible property. It is not creating a new power in corporations, but only providing for the effectuation of a power assumed as already existing, and is clearly to be taken as additional to and in furtherance of the act of Nov. 9, 1850, to relieve the necessity of a change of possession, which under the common law of the state would be necessary in order to render security on chattels given under the act of 1850 effectual against sales and attachments. In 1857 it was enacted, — 'Section 1. In all cases where a mortgage of any railroad, or any part thereof, made by any railroad company in this state to secure the payment of bonds shall have been foreclosed, and the legal title to the premises vested in the mortgagees, any number of persons holding a majority in amount of the principal of the bonds so secured may form themselves into a corporation for the purpose of owning or maintaining and operating such railroad,' &c., providing in detail for the organization. Section 7 provides, in case of the failure of the bondholders to form a new corporation, as before provided in case of foreclosure, or if the railroad on which the mortgage exists shall be sold or assigned by virtue of any order, decree, or judgment of any court, the purchaser or purchasers, grantee or grantees, shall have, take, or possess all the rights, powers, and privileges before granted to a majority of the bondholders, and may become a corporation in the manner prescribed, and have all the powers, franchises, and privileges, and be subject to all the duties granted to, or imposed upon railroad corporations by law. These enactments, all of which are em-

and somewhat complicated in its details, and I have devoted my time and energies to its full and faithful comprehension. But

bodied in the General Statutes, page 237, leave no doubt as to public policy as bearing upon the subject now in hand.

"But it is said, if the corporation is permitted to convey away its franchises and its property essential to their exercise, it will disable itself from performing its obligations to the public. It might seem to be an answer in point, that unless it is permitted to do so, it will never have the ability to discharge those obligations. But let us inquire a little into the legal and practical character of those obligations.

"It is assumed by the court, that, if a corporation would entitle itself to the enjoyment of its franchises, it must comply with the conditions and requirements of its charter, both express and implied, so far as its duties to the public are concerned. It must act under its charter for the accomplishment of the purposes designed by it. But it is at the option of the corporation whether it will do so or not. The only remedy in behalf of the public is by a proceeding to enforce the forfeiture of the charter of the corporation. The corporation cannot be compelled either to make or to operate a railroad. Whether it will do so or not depends upon the expectation of its being a feasible and prosperous enterprise. If it should find or expect it to be a profitable one, it would be likely to continue its prosecution. If the corporation should, for prudential considerations, see fit to transfer to others its property, with the franchises appertaining to such property, the same motives would operate upon the assignees, and to the same intent as upon the corporation. The assignees would hold, subject to the duties and obligations to the public which rested upon the corporation, and in order to take any benefit from the assignment would find it necessary to answer to those obligations and duties. The same remedy would be effectual, as far as rights depending upon the franchises of the corporation were concerned, upon the assignees as upon the corporation. The assignees could no more convert the roadway to other uses than could the corporation. They could no more turn to any other account than the operating of a railroad any of the corporate rights and duties, than could the corporation. So far as property held in absolute title was concerned, the corporation and the assignees could equally dispose of it as they should see fit, whether such property was essential to the operating of the railroad or not. So long as the rights and privileges conferred upon the corporation should be exercised in accomplishment of the purposes for which they were conferred, there would seem to be not only no occasion, but no right, on the part of the public to interpose between the corporation and the assignees, — certainly not by taking a forfeiture of the charter; and, as it seems to us, equally none on the part of individuals, by way of questioning the assignment on the score of public policy.

The idea of a particular confidence reposed in the particular persons who compose the corporation, for the service of the public interests involved in the making and operating of the proposed railroad, seems to us altogether fanciful and theoretical. In fact there is no such confidence. From the nature of the case there could not be. For who shall compose the corporation at any par-

however important and complicated the case may be, in its facts and in the rules of law applicable to them, I must say that I

ticular time depends on who own shares of the capital stock, — one set of men to-day, another to-morrow, some citizens of the state, some foreigners. The true idea is, that the public relies for its assurance that its rights will be duly answered upon the fact that they must be, in order that the conferred privileges may be held and enjoyed by the corporation, of whomsoever composed, not upon any personal confidence which the legislature has in an indiscriminate body of persons, — men, women, and children, — citizens and foreigners, daily changing, who may become or may cease to be stockholders at their own pleasure, without restraint.

"Now to recur to the mortgage. What does it purport to convey? The premises mentioned in the following vote: 'Resolved, that Mr. Clark, the president of this company, be appointed their attorney and agent, to execute a mortgage of their road and its franchise to Daniel S. Miller and Shepherd Knapp, &c.'; that is, such title as the corporation had, and the privilege appertaining thereto, viz. the right to the roadway, for the purpose of making and operating a railroad, as provided by the charter, with the privilege of making and operating it, and enjoying the emoluments thereof.

"We think, upon the views thus presented, as well as in conformity to several cases adjudged by courts of the highest character, as also to the opinions of eminent juridical writers, that it should be held that the corporation was competent to convey in mortgage what this mortgage purports to cover and convey, viz. the road and its franchise, as now construed. See Redfield on Railways, § 235 (vol. 2, pp. 510 – 552), and cases cited in notes; see particularly note 22, and the case of Hall *et als. v.* Sullivan Railw. (p. 522), in which we think the authority of a corporation to mortgage its franchise to build, own, and mortgage a railroad, and to take tolls thereon, is put on satisfactory grounds. See also the opinion of *Davis*, J., in Morrill *v.* Noyes, recently decided in the Supreme Court of Maine, 3 Am. Law Reg. N. S. 18. It is to be noticed that the language of this mortgage, in describing the subject on which it was to operate, does not bring in question the much vexed subject of the power of a corporation to transfer its franchise of existence. It purports to convey only the road and its franchise; which terms embrace only such rights and privileges as are involved in the owning, maintaining, and operating of the said railroad, and in the receipt and enjoyment of the income and emoluments of so doing. The franchise conveyed is by the language restricted to the franchise that the corporation had in the road itself, and therefore cannot be regarded as touching other franchises not named, such as the right of being a corporation with perpetual succession, of suing and being sued under its corporate name, &c. The language of *Bennett*, J., in Bank of Middlebury *v.* Edgerton *et als.*, 30 Vt. R. 182, 190, we adopt in word and principle, as expressing the true idea upon this subject as involved in the present case. He says: 'It is not necessary in this case that we should hold that the franchise to this company, to be a corporation, is a subject of sale or transfer. The right to build, own, manage, or run a railroad, and take tolls therefor, is not of neces-

have not been able to convince myself that there is really any doubt how it ought to be determined. The best attention I

sity of a corporate character, or dependent upon corporate rights. It may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable,' citing Peter *v*. Kendall, 6 B. & C. 703; Comyn's Digest, Grant, C.

"It is now to be considered what constitutes the road within the meaning and operation of the mortgage. This is mainly matter of construction, in the light of the condition, character, and circumstances of the subject-matter. At the time the transaction took place, a railroad had been located between the two *termini* and put under contract, and was in the process of construction, but was in no part completed as a railroad ready for use. It could not be that the mortgage was intended to be confined in its operation to the road in the condition in which it then was. Indeed the very purpose of the mortgage was to enable the corporation to obtain an article of construction necessary to its completion as a railroad. It is too plain to require discussion that it was the intention of the parties that the mortgage should take effect upon the road in its completed condition, proper and ready for use in running over it in the ordinary manner in that kind of business. And such is the legitimate force and import of the term as used. It was not a *road*, viz. a railroad, in the condition it was in at the time of making the mortgage. It was a mere roadway, in the process of being wrought out into a railroad. The mortgage is not of a roadway, or a right of roadway, or of a roadway in process of being wrought into a roadway, but of 'their road.' It also seems plain that the mortgage was designed to take effect upon the railroad, as it should exist under the rights of the corporation, at the time the mortgagees should succeed to the rights of the corporation, by virtue of the due enforcement of the mortgage. It may be taken as granted that in fact the location of the road was changed in different points from the place fixed upon in the original location, after the mortgage took effect, and that it has been located and constructed beyond one terminus of its location and survey, as it was at that time. Still, if it is the railroad of the corporation under its charter, the whole becomes, in our apprehension, subject to the mortgage. No other view is practicable without impeaching both parties of a very imperfect comprehension of the subject they were dealing with. The value of the security depended entirely on its capability of being used as a railroad. Only by reason of its being so used would either the corporation or the mortgagees hold any rights in reference to it; for an abandonment of this use would subject such rights to a forfeiture, and the land covered by the road to a reverter to the owners of the fee. This fact seems conclusive as to what was the intention of the parties, so far as the change of location is concerned; for to the territory covered by the abandoned location the corporation and their assignees lost all rights by the fact of abandonment. So, too, in respect to the addition at one end of the road, the same rule applies. The idea that two miles more or less of a railroad, continuous between two fixed points, constructed in the same right, and to be used in the same right, and as part of the same road, were to be

have been able to give it has convinced me that there is really no doubt in regard to the questions of law presented in the fol-

severed and held by the corporation, as against the operation and effect of the mortgage, if it exists at all, must have had its origin at a period much more recent than the mortgage now in question.

"Such being regarded as the true construction of the mortgage in the meaning of the terms and the intent of the parties, it should be allowed to have effect accordingly, unless prevented by the intervention of some legitimate obstacle. And in this respect it is asserted that the corporation had not acquired the right of way to a considerable part of the road at the time the mortgage took effect, for the reason that it had not paid the land damages to the respective owners. It seems a sufficient answer to this that any defect of title, as between the mortgagor and the mortgagee, to the subject conveyed by the mortgage, is a matter for them alone to take care of; and least of all could it properly be asserted against a claim to foreclose the mortgage, either by the mortgagor or by those standing upon rights under him as subsequent mortgagees. If the landowners have not got their pay, it is for them alone to look after their rights in this behalf. If anybody has paid any of them at the request of the corporation, they can assert their claim to reimbursement of the party at whose request they did it, in such time and in such way as they should be advised. If somebody has volunteered to make such payments, it will be seasonable to determine as to their rights and remedies when a proper case shall be presented for adjudication. The rights and claims of parties in respect to the roadway, that may affect the security in the hands of the mortgagees, we think cannot properly be brought into question, much less adjudicated, on this proceeding to enforce the security against parties that are subjected to it. And this view relieves us from considering and discussing the effect of the consent, shown to have been given by the land-owners, to the making of the road without an appraisal and payment of the damages as a condition precedent.

"In the view we have thus taken of the construction of the mortgage, there seems to be no need of considering the mooted question, as to the operation of a mortgage upon subsequently acquired property as accessory to the principal and present subject-matter of the mortgage. The road then in the process of construction, with the rights and privileges of the corporation in it as a road completed, was the thing mortgaged. The accessions to it by way of completing it are not to be regarded as subsequently acquired property in the sense of the cases in which the subject has been discussed, distinct and separable from the principal thing, leaving that entire and complete, and being in themselves entire and complete, but are to be regarded as constituting an incorporated and inseparable part of one entire thing, viz. the road. Such being the construction of the mortgage as to the meaning and intent of the parties, the operation we give to it is amply countenanced by the case of Willink *v.* Morris Canal and Banking Co., 3 Green. Ch. 377; by Redfield on Railways, § 235 (vol. 2, pp. 533–550), and notes 25, 28, 31; 33; and by an article by the same author in 2 Am. Law Reg. N. S. 527, 528, 529, in which it is said: 'The assignment of future acquisi-

lowing opinion. And as those were decisive of the case, I have omitted all allusion to others of a more questionable character;

tions will not become operative at law. But in equity it is settled by a long series of decisions that such an assignment is perfectly valid and effectual if made upon a valid consideration'; citing several cases in England, and giving the substance of Halroyd *v.* Marshall, recently decided in the English House of Lords, and reported in 9 Jurist, N. S. 213, and closing with the following remarks: 'This decision, resting as it does upon unquestionable grounds of principle and authority, cannot fail to have a most important bearing upon similar questions in this country, which have always been numerous in this country, both in regard to railways and to the equipments of railways, and some of which have been already determined by the courts in favor of the equitable rights of the mortgagees, without seeming to comprehend very fully the equitable grounds on which they may be made to stand. See also Hart *v.* F. & M. Bank, 33 Vermont R. 252; Coe *v.* Pennock, 23 How. (U. S.) 117, where Mr. Justice *Nelson* and the counsel in argument go into an examination and discussion of this question in all its bearings, and the learned judge arrives at the same just conclusion substantially with that already intimated as having been reached by the House of Lords.' See also Morrill *v.* Noyes, *supra*. It is to be understood that in making these references and quotations, nothing is to be regarded as adopted and decided in this case beyond what is embraced and implied in this mortgage, giving the effect we do to its terms in their application to the subject-matter. And here it is proper to say that we do not regard the mortgage in question, either by its terms or by any fair implication, to embrace any articles of property by way of completing and furnishing the road, not entering into and constituting a part of the structure of the road, nor being erections upon land. This would therefore exclude from its operation what is called rolling-stock, and other personal chattels, that go to make up the usual and necessary furnishing and equipment of the road, but not so affixed to the land as to acquire the character of the realty. The mortgage does not embrace any other subject of conveyance but 'the road and its franchises,' differing in this respect from the mortgages or other conveyances in all the cases referred to, where they have been held operative to convey personal property subsequently acquired.

"To the suggestion that the mortgagees can only obtain the fruits of this mortgage in virtue of the continued existence and organization of the corporation, and the corporation having parted with rights that are indispensable to its fulfilling the ends for which it was created, would be no longer entitled to continue, and so the ends for which it was created would be defeated, — it seems sufficient to say, that whether its potential organization and continuance would continue or not, would depend on whether it should have subjected itself to the forfeiture of its charter, by the failure to answer the purposes for which it was created, in the matter of its duties to the public. So long as those duties should be performed, would not the claim of the public, as well as of individuals, be fully answered? And is it to be presumed in anticipation that the assignees will fail to perform those duties as fully as the corporation itself would have

and also to all mere formal defects in the bill, many of which, I have no doubt, must be regarded as fatal to the remedy now

done, when the same motives exist and would be operative upon the assignees and upon the corporation, and when the same remedies may be made available, both in favor of the public and of individuals, for a failure to operate the road, viz. as to the public, a forfeiture of the rights granted under the charter, and in favor of individuals a reverter of the lands constituting the roadway? As to the going out of the corporation by abandoning or ceasing to keep up its organization under the charter, it will be in season to consider that subject, and determine the rights and remedies of the parties interested, when an occasion shall have presented itself, having in mind in the mean time the statutory provisions of 1857, still in force, for proceedings of trustees and bondholders after foreclosure. G. S. 238, and following.

" We proceed now to consider the point made by the defendants, ' that if the orators have no legal estate vested in them by this pretended mortgage, they have no standing in court whereby they can maintain this bill.' To serve this proposition, it is asserted that they can only be made trustees of the bondholders by force of having the legal estate vested in them. No case or book is cited to sustain these positions, and we do not perceive upon what principle they can be maintained. The proposed security for the bonds was to be made by a conveyance to trustees, to hold the title, and to make the security available by such measures as the law might warrant in case it should become necessary to enforce it. Whatever right or interest might appertain to the bondholders in or to the security, was the equitable one of *cestuis que trust* under, and by virtue of, the title conveyed to and vested in the trustees. Whether that title was legal or equitable, the intervention of trustees was the means by which its beneficial purposes were to be made available to the bondholders. In view of the purposes designed to be effectuated by the transaction of the attempted security of the bonds, the trustees became charged with the duty of asserting and enforcing such title as was vested in them, as a necessary means of effectuating such purposes. It would present a case of striking singularity if it should be held, that because the mortgage was equitable and not legal, that therefore the trustees to whom it was made were not entitled to enforce it in the character it possessed in contemplation of law, and for the ends for which it was created. In saying that ' one object of the bill is to make them trustees by reforming the instrument, and until that is done they have nothing to stand on, and of course at the institution of the suit they were without rights,' it would seem to be begging the whole question. The bill is brought to enforce and foreclose what is claimed to be an existing, enforceable, and foreclosable mortgage. It sets forth all the facts upon which the claim is based. Among other things, it sets forth the doubt whether the instrument as executed would be held for all technical purposes a legal mortgage as the deed of the corporation, and asserts that the orators ' are entitled to a decree that the same be by the railroad company formally and solemnly executed, so that it shall at law, and against all the defendants, be deemed to all intents and purposes a mortgage, and as such, a bind-

sought; and some of the questions made in argument, and not here alluded to, I presume are equally fatal to all claim of priority on the part of the plaintiffs, in any form.

ing first mortgage and conveyance upon and of the road, property, and franchise.' But no prayer is framed upon that averment, nor is it claimed in the closing argument of the orators' counsel as a ground of relief. The bill claims a foreclosure on the ground that the whole transaction constitutes an equitable mortgage to the same intents in a court of equity, and for the purpose of enforcing the security, as if the instrument executed by Mr. Clark had been the technical deed of the corporation.

"Upon the familiar principle that equity treats what is agreed to be done and ought to be done as done, and following the principle of many adjudged cases, there would, for the purposes of this suit, — viz. the enforcement of the security, — be no need of a preliminary decree for the reformation of the deed. The parties are not in this court standing upon rights that can be recognized only when they are created in a strict compliance with the technical rules of law, but upon rights that arise upon the substance and reality of the transaction, when there has been an accidental omission to comply with some technical rule of law. Holding, as we do, that the case stands precisely the same in this court for the purposes of the relief sought as if the instrument in question were the legal deed of the corporation, as matter of course the same effect is to be given to it, in all respects essential to the remedy to be applied, as if it were such legal deed.

"It is obvious from what has foregone, that we do not regard the equitable rights of the orators to be of so uncertain a character as, according to a point made by the counsel for the defendants, to render it improper for a court of equity to give relief. Indeed, in our view, it is in no respect uncertain. Their right in equity is as well defined and as well grounded as their right at law would have been, if the instrument executed by Clark had been the technical, valid mortgage of the corporation. The resolutions of the directors, and the instrument made by Clark, in connection with the fact that the corporation issued the bonds for the purpose of their being used for the purchase of the rails, and that the trustees under the other mortgages had notice and knowledge of all these facts, constitute a groundwork upon which the law predicates a clear and definite equity in the orators, as trustees of the security thereby created. That the subsequent mortgagees misappreciated, and therefore doubted the rights created by these facts, does not constitute any such uncertainty as, upon any principle, can be made available to them against those rights. This is by no means such a case as Cordwell *v.* Mackrill, 2 Eden, 244, cited by Judge *Redfield*, in his opinion as counsel in this case, though we assent to and adopt the entire doctrine embodied in the language of the Lord Chancellor, in saying that 'a man must indeed take notice of a deed, upon which an equity supported by precedents, the justice of which every one acknowledges, arises; but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends

I. The questions involved in the present controversy do not arise between the plaintiffs (representing the interests of certain

upon their location.' We also accord fully with what was said by the Master of the Rolls, 9 Vesey, 583, 588, Parker *v.* Brooke: 'In Cordwell *v.* Mackrill, Lord *Camden* doubted whether the articles should be reformed, and there may be such a doubtful equity that the purchaser is not to be taken to know what the decision will be, and this is all Lord *Camden* means. But in this case the equity is clear.'

"Nor do we see wherein there appears to have been any negligence in the assertion of those rights. They have on all occasions been insisted on whenever called in question. They have always been regarded and recognized by the corporation, and were recognized and regarded by all parties in the transactions of making the second and third mortgages. This suit was commenced in about one year after the first instalment of the $ 25,000 of the principal fell due. Moreover it is to be remarked that the pleadings present no such ground of defence. The defence rests on the alleged incapacity of the corporation to make or become bound by such a mortgage, — on the alleged invalidity of the instrument, on the subsequent mortgages, taken in good faith, and, as is alleged, without notice of the prior mortgage, and on the alleged lack of title of the corporation to portions of the road.

"And we remark further, as to another suggestion of defendant's counsel, that we do not regard the orators as 'standing upon a naked equity against an equal equity and legal title combined.' On the contrary, we regard them as standing upon a prior and superior equity, against a subsequent one depending upon a legal title that was taken charged with such prior and superior equity.

"Without further discussion of points, or comment upon various views and suggestions presented in the argument, sufficient has been said to develop the views and opinions of the court upon the controlling points in the case. The ultimate conclusion is, that the orators are entitled to a decree of foreclosure, and unless the sum found to be due upon the bonds issued under the mortgage to them, as established by this decision, is paid by the time fixed by the Court of Chancery for redemption, with the cost of this suit, that they are entitled to hold as trustees, upon the trusts created by the said mortgage, the said railroad, as against the defendants to this bill, with all and the same rights thereto, for the purpose of using and maintaining the same as a railroad, that the corporation and the other defendants holding under the corporation would have, in case the mortgage to the orators should have been redeemed, in pursuance of the decree herein made, and unless so redeemed, that the orators are entitled to be put in possession of the said road by proper process of the Court of Chancery, in execution of the decree in that court for such foreclosure, and that the orators recover their costs in this court, and may have execution therefor.

"The decree of the Chancellor is reversed, and the case remanded to the Court of Chancery, to ascertain in a proper way the sum due on the bonds secured by said mortgage, and to make a final decree, in conformity with this decision."

creditors), and the company alone, as debtor. If that were the case, merely formal defects in the execution of the instrument under which the plaintiffs claim, would be of comparatively little moment. For the receipt and retaining of money by the company, of which there is no question in the present case, has often been held to be a confirmation of the contract under which it had been originally obtained.[2] Very slight circumstances will often be seized hold of by courts, as evidence of the confirmation of a contract defectively executed by the parties, where no intervening rights have accrued. This rule, however, will not apply where the contract was executed under a *defective power*, or where it is, in the case of a corporation, *ultra vires*, of which we shall speak more in detail hereafter.

II. But the important consideration here is, that the controversy arises between different classes of the creditors of the company; and there is no principle of equity jurisprudence better settled than that all *bonâ fide* creditors, or purchasers, stand upon equal equity.[3] And in such cases, courts of equity apply the maxim, that equality is equity.[4] But the plaintiffs, to maintain their bill, must show a prior lien, legally created upon the property of the company. If they succeed in doing this, a court of equity will not interpose its peculiar powers to defeat such legal priority. Neither will it lend such aid, to enable one creditor to gain an unequal advantage over others, but, as between creditors, and others standing in equal equity, it will leave them to any advantage fairly gained, resulting from their strictly *legal* rights.[5]

III. In examining the plaintiffs' case in this light, the legal defects in the instrument under which they claim priority are so numerous, and so marked, that it seems scarcely necessary to go much into detail in regard to them.

The contract under which the plaintiffs ask to appropriate all the available means of the company to the exclusion of all the other creditors, assumes to be a mortgage, not only of all the

[2] Whitwell *v.* Warner, 20 Vt. R. 425; Despatch Line of Packets *v.* Bellamy Manuf. Co., 12 N. H. R. 236; Ottawa Plank-Road Co. *v.* Murray, 25 Ill. R. 336.

[3] 1 Story, Eq. Jur. § 64 *c*, and cases cited.

[4] 1 Story, Eq. Jur. § 64 *f*, and cases cited.

[5] 1 Story, Eq. Jur. § 64 *c*.

real estate and fixtures of the company, but also of all the corporate franchises, even the very existence of the corporation itself. This contract is executed, too, by a corporation whose charter, in terms, (§ 9,) secures such franchises to the company alone; and when by the general laws of the state no power to assign such franchises existed. This is attempted to be effected without the action of the corporation itself even, but only through the agency of the directors, and by oral proof of the assent of the stockholders, or rather, that when informed of the fact of the attempt to execute such an instrument, *they were silent*. Such an attempt is expressly declared by the House of Lords to be of no validity, if done without the authority of the corporation.[6] In this case the contract was executed by the secretary by affixing the common seal of the company, which was in his custody, and used by him always in solemnizing contracts, but in this case it was done beyond the scope of his authority.

This proceeding seems to us fatally defective in many indispensable particulars.

1. As the title of the real estate, and especially of the corporate franchises, resides in the corporation alone, it can only be conveyed by the act of that person. The person of a corporation is the artificial being created by its charter, and can act only in conformity with its charter and by-laws.[7] Hence it was decided in this state, at an early day, after repeated arguments and great consideration, that the deed of all the stockholders, professing to convey the real estate belonging to the company by metes and bounds, did not convey the title of the corporation.[8] This was upon the ground that the title resided in the corporation, and could only be transferred by the action of the corporation in the mode pointed out in the charter and by-laws of the company in conformity to the general laws of the state; and that the consent of every stockholder, expressed in any other mode, would have no effect in conveying a title which did not reside in them.

2. In regard to the franchises of the corporation, they are in their very nature, in the case of all corporations, strictly personal

[6] The Bank of Ireland *v.* Evans's Charity, 5 House Lds. Cas. 389.

[7] Dartmouth College *v.* Woodward, 4 Wheat. 518.

[8] Wheelock *v.* Moulton, 15 Vt. R. 519.

and inalienable. And in regard to railways, which sustain very important public functions and responsibilities, these franchises are peculiarly inalienable. No principle of the law of corporations is more clearly established, both in England and America, than this. The cases are too numerous to be here cited.[9]

3. It has been urged in this case, and in many others, where the question has arisen, that this is a question between the corporation and the state. But that is by no means true. It is a question in regard to the *power* and capacity of the corporation. And when a party claims priority of right, through the act of the corporation, it is incumbent upon him to show the existence of such power and capacity in the corporation as to enable it to do that act. Any party interested in the act may take advantage of any defect in the power of the corporation to do such act. This is the case in regard to all attempted acts and contracts of corporations, beyond their powers, or *ultra vires*, as it has been called; and no question has ever been made in the decided cases; but such acts were void, as to all parties interested. So far indeed has this been carried, that in a late decision of the court of C. B.[10] it was held, that a bill of exchange, drawn on behalf of a joint-stock company, which was *ultra vires*, must be held void, even in the hands of a *bonâ fide* holder.

4. And such act of the corporation, done while there exists no statute authorizing it, and consequently no power to do the act, being *ultra vires*, is so absolutely void, that it is incapable of confirmation by any acquiescence of the corporation, or in any mode, except by some act of the legislature recognizing the void act as valid, or expressly confirming it with the consent of the company conveying. The passage of a general law, after the date of the void instrument, authorizing corporations generally to mortgage their property and franchises, will have no such effect upon past transactions, since all legislative acts will be regarded as prospective, unless made retrospective, in express terms. And a contract made while the corporation had no power to do the act, will remain wholly unaffected by such subsequent

[9] *Supra*, § 235, pl. 12, and cases cited. See also Hall *v.* The Trustees of Sullivan Railw., note *supra*, § 235; Coe *v.* Co. P. & Ind. Railroad, 10 Ohio St. 372. The authorities are all in one direction upon this point.

[10] Balfour *v.* Ernest, 5 Jur. N. S. 439.

statute. To come under the protection of the statute their acts must be *bonâ fide* done under it, and not by construction merely. This is the view adopted in all the cases where this question has arisen, and they are very numerous.

IV. It must be borne in mind always, in considering a question of this kind, arising between creditors, that they are only affected by the registry of a prior mortgage, or actual knowledge of a valid conveyance, and consequently cannot be affected by any act, whether of the corporation or the legislature, unless it appear upon the registry, and only from the time when it so appears. Consequently, having noticed a deed executed, which the corporation had no power to execute, they would not be bound to inquire whether the corporation subsequently acquired such power, and certainly they would not be bound to infer that such power was acquired, by any subsequent statute, never calculated or intended to give any such power.

1. And if it could be maintained, upon the proof of an entry in the books of the company merely, to that effect, that the bonds issued under this first mortgage were delivered after the statute giving railways the power to execute mortgages came in force (which is no proof ever, and especially here, where the circumstances afford the most convincing evidence of collusion on the part of the officers of the company, in regard to the validity of this very instrument) ; if, upon such mere entry in the books of the company, and no proof, it could be assumed by the court, which we know very well never will be, that these bonds were really delivered after the statute came in force, it would make no difference as to these defendants, who stand, and have a right to stand, upon the *mortgage*, and as it *appears* upon the registry : and are in no sense expected to look beyond that in any case. Any the slightest departure from this salutary and inflexible rule would throw all the land-titles in the country into the most inextricable confusion, and would be vastly worse than a repeal of the entire registry system, since it would render it a blind and a delusion, rather than a reliable guide, as it should be, and was intended to be, and must be made by the courts, unless they are willing, out of the perversion of good statutes, through false constructions, to heap curses and confusion upon the heads of the people.

2. And the same rule applies if the registered instrument is, in any other statute requirement, defective. It is then not entitled to registry, any more than a note of hand, or any other contract. And its being placed there is of no force or validity, and is therefore not constructive notice to subsequent purchasers or encumbrancers. They are not in law presumed to have seen this false registry; they are not bound to look for it, or to take notice of it, even when shown to them, which is not here pretended. These principles are fully recognized in this state.[11] And the principle is of universal application, and has been often since recognized.[12] As to the right of creditors to disregard a contract, void on its face, for defect of power to execute it, see Grosvenor *v.* Allen,[13] where this doctrine is fully maintained.

V. But the instrument under which the plaintiffs attempt to maintain such exclusive claim to priority over the other creditors, is not only executed without any *power* whatever in the corporation to do such act, but it fails, in numerous essential particulars, to meet the requirements of the law, in giving expression to such powers, as the corporation did possess over a portion of the subject-matter, such as their roadway and its superstructure. We say nothing here of the fact that most of this was merely in the future, and not the present property of the corporation. But assuming that they might mortgage it, which is going a great way, since they confessedly could not sell it, having acquired no title, except for use, the instrument under which the plaintiff claims wholly fails to meet the requirements of the law, as a mortgage of the real estate of the company.

1. It is not in the name of the company, and therefore is not their deed, which is absolutely indispensable in order to convey their title.[14] This is held, in Isham *v.* Bennington Iron Co.,

[11] Isham *v.* Bennington Iron Co., 19 Vt. R. 230.

[12] Pope *v.* Henry, 24 Vt. R. 560.

[13] 10 Paige, 74; Walworth, Chancellor, p. 77.

[14] This point is expressly decided in the following cases: Wilkes *v.* Back, 2 East 142; Appleton *v.* Brinks, 5 East, 148; McDaniels *v.* Flower Brook Manuf. Co., 22 Vt. R. 274; Hatch *v.* Barr, 1 Hammond (Ohio), 390, where it is said of a deed, naming the president and directors of a corporation as grantors, and signed "Oliver M. Spencer, president" of the company named: "The person who executed it had no interest in the subject conveyed." "It is therefore no conveyance."

supra, to be indispensable, except under the express provision of the statute of 1815, allowing the deed to be in the name of the president, by the deed reciting the vote of the corporation. But that is altered by the revision, as was held in McDaniel *v.* Flower Brook Manuf. Co., *supra*. And under the existing statute, as was there expressly held, the deed must be executed in the *name* of the corporation, in the words of the statute, "by an agent appointed by vote for that purpose."

2. But this deed is not only not in the *name* of the corporation, but it was not executed by the *authority* of the corporation, but only in pursuance of the vote of the directors. It has been repeatedly decided that the directors of a corporation have no such power. They are only the general business agents of the company. They have consequently only authority to transact those functions of the company which come under the general denomination of business. And the provision of the charter of this company, defining the board of directors and their powers, that it shall consist of five persons, and shall be competent to transact all the business of the company, does not go beyond the ordinary powers of directors. All the business of a company does not imply anything but *ordinary business;* what is called the proper business of such company, that is, in the case of a railway, the construction and operation of their road. The general agent of a copartnership has authority to transact all their business, but he could not convey their real estate, or execute a general assignment of their property for the benefit of creditors. The same is true of the general agent of a natural person.

3. It would be contrary to all the received rules for the construction of statutes to give such an incidental expression in a private charter the force of repealing the general statute of the state in regard to so important a matter as the conveyance of real estate by such corporations. And especially would this be contrary to all established rules for the construction of statutes, since it is transferring a provision from one subject-matter, viz. the board of directors and the general business of the company, to the conveyance of real estate, which is not named, and could not, by any reasonable intendment, have been in the mind of the legislature. The assignment of all the franchises and all the

property of a corporation would be to *annihilate* and not to "*transact* their business."

4. But it has been repeatedly decided, that the directors of joint-stock corporations, and particularly railways, have no such powers as are here claimed. They have no power, without a vote of the stockholders, to apply to the legislature for an enlargement of the corporate power.[15] And even where the directors of a company had power to lease the works of the company, it was held that they could not in the lease give an option to the lessee to purchase or not the entire works of the company, at a price fixed, at any time within twenty years; and even that a confirmation by a meeting of the shareholders could not effectually sanction the contract, but that the absolute consent of every member of the company was indispensable to give it validity, even as against the company.[16] In regard to the ratification by the subsequent meeting of the shareholders, in the case last referred to, the Vice-Chancellor said: "I think that the meeting could not confer upon the managing body authorities beyond those which were conferred by the deed [or charter of the company.]" "But in my opinion the persons present, although they might bind themselves, could not, even if they constituted a majority of the company, bind the minority; nor could they bind absent parties to the disposal of the real property of this company in a way not contemplated by the deed of settlement." This goes upon the ground that the consent of the majority will not enable a corporation to do an act not within their corporate powers, or to do one within such powers in a different mode from that pointed out in their charter. They can only act in conformity to the charter. And the consent of the majority, or even of all the shareholders, will not enable them to act otherwise than according to the provisions of their charter. Lord St. Leonards said:[17] "If directors" [of a corporation] "do act in violation of their deed or charter in a matter in which they have no authority . . . . the thing is not within their power, it is *ultra vires*, and those acts are *altogether null and void*." We could not have

[15] Marlborough Manuf. Co. *v.* Smith, 2 Conn. R. 579.

[16] Clay *v.* Rufford, 5 De Gex & Smale, 768; s. c. 19 Eng. L. & Eq. 350.

[17] Bargate *v.* Shortridge, 5 House of Lords, Cas. 318.

a better or a fuller authority upon this point: Since an act "altogether null and void" can never be affirmed. It must, in the nature of things, require what is equivalent to some new action of the corporation, the same as if nothing had ever been done. A void act is the same as no act. There is therefore nothing to be confirmed. It is different where the act is merely voidable or defectively executed.

VI. This attempt to convey the real estate of the corporation by the vote of the directors merely, is in direct violation of the express requirements of the general statutes of the state then in force.

1. It was decided in Isham *v.* Bennington Iron Co., *supra*, that all such provisions in the general statutes, in regard to the conveyance of real estate, were exclusive; that the expression "may convey," as applied to corporations, means "shall convey," whenever they have occasion to do so, in the mode prescribed. Thus making the provision peremptory, as to the mode of conveyance, and discretionary only as to the occasion. The terms of the statute are: "Any public or private corporation, authorized to hold real estate, may convey the same by an agent appointed by vote for that purpose."

2. The argument that this statute does not require the vote of the corporation, but that the vote of the directors will be sufficient, is certainly at variance with the natural and obvious meaning of the language, and is such a departure from the express words of the former act, that, if there had been any purpose of changing the law, in so important a particular as giving directors authority to convey the real estate of corporations, it would have been fully expressed, and not left to any doubtful construction. This view of the import of the revision of the statutes is in accordance with the uniform course of decision in this court, holding that no alteration of the old law was intended unless it was clearly expressed. And this very statute, upon this very point, was before the court in McDaniels *v.* Flower Brook Manuf. Co., *supra*, where it is said: "And while these private corporations are required to keep records of their proceedings, and are only to convey *lands by the vote of the corporation*, through an agent appointed for that purpose, a deed executed in the manner this was, without reciting *the vote of the corporation*, will sufficiently indicate where the power is to be found." The court here,

in one short sentence of comment upon this very statute, twice use the terms, "vote of the corporation," as the indispensable *power* to convey the title of real estate of the company under the statute. We could not desire any more satisfactory evidence of the proper construction of this statute. And it has seemed to us that nothing short of the exigencies of a particular case could ever have suggested any other construction. We certainly could not entertain any doubt of this construction being always maintained by the court.

VII. The addition to the name of Merritt Clark, "as I am the president of said company," in the body of the instrument, and in the acknowledgment also, with the addition "and the free act and deed of the company," has no tendency to show an execution *by* the company, or in the *name* of the company. It has been decided, innumerable times, that such a mode of execution would not bind the company, even where the agent had the power to do so.[18] This is the universally admitted rule, as to all sealed instruments executed under a power.[19] The latter case is precisely in point, as the present instrument is executed as agent, but in his own name, by the agent, which renders it the deed of the agent and not of the principal. The two last cases are precisely in point to show that the instrument under which the plaintiffs claim is the deed of Merritt Clark in his private capacity, and not as president of the Rutland and Washington Railway. It is in vain then to argue that it can, by any possibility, convey the title of the company, if this were its only defect. And most of the cases referred to in Roberts *v*. Button, *supra*, are equally in point to the same effect. In fact, there has never been any question among lawyers in regard to this point since the resolutions in Combes's case.[20]

VIII. The argument that this instrument becomes the deed of the corporation, by the force of the corporate seal attached, was expressly negatived in the case of Isham *v*. Bennington Iron Co., *supra*, even where the corporate seal was shown to have been attached at the time of the execution. But in the present case

[18] Taft *v*. Brewster, 9 Johns. 334; cases cited in Roberts *v*. Button, 14 Vt. R. 195.

[19] Spencer *v*. Field, 10 Wendell, 87; Steed *v*. Wood, 7 Cow. 453.

[20] 9 Co. Rep. 75.

it is impossible to say this, both on account of the unusual position of the seal, and the fact that this seal was not adopted by the corporation until subsequent to the date of this instrument. It would be wonderful that under such circumstances any one should ever claim that this impression of the corporate seal rendered the instrument the deed of the company, and was equivalent to signing. It would be far more plausible to claim, that the fact of the seal being attached to the paper, after its execution, amounted to such a material alteration as to avoid the instrument. We might adopt this view if it were not that this impression of the corporate seal was in such a position, being at the very top of the paper, that it could not be regarded as forming or intended to form any portion of the instrument. If it were not for this it certainly must have that effect, since it is certain, from the proof, that the impression must have been made after the date of the instrument, and there is no doubt the instrument was executed on the day it bears date. And even were the seal affixed, as an act of execution, and we were to disregard the decisions of our own court, it will be found that the English courts now hold that sealing is not equivalent to signing.[21] It has sometimes been held that in the case of corporations sealing was equivalent to signing. But that is denied in Isham *v.* Bennington Iron Co., *supra*, and in many other cases.

Part II. Having found in the instrument under which the plaintiffs claim, both an entire defect of power in the company to execute the deed, and a total want of any proper action on the part of the company, as well as an utter want of the proper form and mode of execution, it would seem idle to pursue the subject further. But as we have thus far spoken chiefly of the effect of the registry of a defective deed, and shown that it has no operation upon subsequent encumbrancers, it may be inquired by some, whether there may not exist such notice in fact in the case as to affect the interest of subsequent encumbrancers.

Div. IX. There is no satisfactory evidence of any such notice, except what results from the fact of Miller being one of the trus-

[21] The early cases of Lemaine *v.* Stanley, 3 Lev. 1, and Warneford *v.* Warneford, 2 Strange, 764, are rejected as unsound. See Wright *v.* Wakeford, 17 Vesey, 458; Lord Hardwicke in Gryle *v.* Gryle, 2 Atk. 76; Parker, Ch. B., in Ellis *v.* Smith, 1 Vesey, Jr., 12.

tees in both mortgages, and Baldwin the treasurer of the company, (and through whom the present holders of the several mortgage bonds derive their title,) having had knowledge of the attempt to execute a former mortgage. But there are at least two unanswerable reasons why these facts cannot affect the interest of the holders of the second mortgage bonds.

1. These mortgage bonds, by the uniform current of the American decisions,[22] are regarded as strictly negotiable paper.[23] Of course notice to the payee or trustee, or to any former holder of such paper, cannot affect the interest of the present holders. Any notice of a defect in negotiable paper will be of no avail beyond those to whom it is communicated, unless it is attached to the paper itself. All the holders of these bonds testify distinctly that they have no knowledge of any former mortgage.

2. The notice to all the parties was of such a character as not to affect them with any fradulent purpose in regard to the first mortgage bondholders; and that is indispensable in order to postpone the second bonds to the first, even in his hands. The notice of the existence of the instrument under which the plaintiffs claim, was connected with the fact that the instrument was informal and wholly invalid and void. Such notice was then, to all intents as to every one, wholly void and of no effect. No party had any occasion to inquire into a title, when he was told, in the very breath communicating the fact of its existence, that it had never been legally executed by the corporation.[24] It was more calculated to put him off inquiry than no notice at all.

3. And it is very questionable whether the fact that Miller was trustee in the former attempt to execute a mortgage could be of any force as to the subsequent mortgage, even if the securities had not been strictly negotiable. 1. He was, even as to an instrument not negotiable, strictly an agent. 2. The notice of the former attempt to execute a mortgage being acquired in another transaction, would be no notice to affect those interested in a different and distinct transaction. 3. By

[22] With the exception of Penn. Diamon *v.* Lawrence Co., 37 Penn. St. 353, which rests upon peculiar grounds.

[23] Cases cited *supra*, 239; White *v.* Vt. & Mass. R. R., 21 How. (U. S.) 575; Chapin *v.* Same, 8 Gray, 575.

[24] 1 Story, Eq. Jur. § 400 *b*, and cases cited.

lodging in his hands the $250,000 bonds for the benefit of the former bondholders, it showed that, instead of attempting to gain an advantage over them by the execution of the second mortgage, he was really doing them a service by procuring them bonds secured by a first mortgage on the road, in exchange for their bonds which were not secured at all. But these questions are not important to the interests of the present *bonâ fide* holders of the bonds, and need not be here discussed or settled. If it were conceded that Baldwin and Miller both acted fradulently as to the inchoate rights under the first mortgage, which is very questionable, it will not affect the bondholders under the second mortgage.

4. It is claimed that the other trustees had notice in fact of the first mortgage. But this is denied by them both, and cannot be regarded as sufficiently established. And if it were proved it does not essentially vary the plaintiffs' case. That will not affect the equity of the bondholders any more than notice to the payee, or any former holder of any other negotiable security.

These trustees sustain no relation of agency by which they can be regarded as representing the future *bonâ fide* holders of the securities under the mortgage. They are merely nominal parties. This is so declared in Sturges *v.* Knapp.[25]

This point is settled in Curtis *v.* Leavitt,[26] and in numerous other decisions in the American courts, where it has been held that the fact that the trustee, named in railway bonds and in government securities, or those who disposed of them in the first instance, or any subsequent holder, having acted fraudulently or even feloniously, will not affect the title of a *bonâ fide* holder.

The great difficulty with the plaintiffs' case is, that they have acquired no equitable rights through any agency of the corporation ; and the equity of the defendants is most unquestionable, and they, having both the equity and the legal priority, cannot be postponed to an inferior equity.

X. The claim in argument that the court, failing to maintain the first contract in its present form, shall treat it as an agreement to execute a mortgage, and decree specific performance,

[25] 31 Vt. R. 54.

[26] 15 N. Y. Rep. 174, 258.

and also a foreclosure at the same time, we suppose, is one which it will be impossible to maintain upon any powers hitherto exercised by courts of equity.

1. Because the instrument is not, and never was intended to be, *a contract to execute a mortgage*. Such a course would therefore be to *make* a contract for the parties.[27]

2. But if it were so in terms it could not be legally registered, and therefore the registry would not be constructive notice to the subsequent encumbrancers, and there is no pretence of notice in fact.

3. A decree for specific performance would therefore be impossible, even if the contract to execute a mortgage were conceded. 1. Because of the occurring of the intervening rights of subsequent *bonâ fide* encumbrancers. There must be notice of the prior equity to entitle the party to a decree.[28] 2. Because such a decree would be to aid a defective power, and not merely the defective execution of a power, which courts of equity will never do.[29] 3. The lapse of time is an invincible obstacle to a decree for specific performance.[30] If the party have long acquiesced in a contract, it is not allowable for him to demand of a court of equity that it be reformed, or set aside, unless he can show some special excuse for the delay, as that the party was kept in ignorance of his right through the fraud of the other party.[31]

The whole history of equity jurisprudence will not furnish a single well-considered case, where the courts have set up an agreement to execute a mortgage, or the defective execution of a mortgage, as a valid mortgage, against subsequent encumbrancers, unless the holders of the securities under the junior mortgage took them subject to the prior encumbrance in terms, or else with full knowledge of its existence, either constructively or in fact.[32] In this last case the second mortgage was defective, but it was expressly recited as a prior encumbrance, and the

[27] 1 Story, Eq. Jur. § 161, and cases cited.
[28] 1 Story, Eq. Jur. § 784, and cases cited.
[29] 1 Story, Eq. Jur. §§ 169, 174.
[30] White *v.* Yaw, 7 Vt. R. 357.
[31] Savery *v.* King, 5 House of Lds. Cas. 627.
[32] Coe *v.* C. P. & Ind. Railw., 10 Ohio St. 372.

third mortgage made subject to it. Upon this ground the court held it binding upon those interested under the third mortgage. And in some cases full notice to the subsequent encumbrancers of an out-standing contract for a mortgage, or a defectively executed one, may postpone their claim, where it was taken with full knowledge that the contract or defective mortgage was the consideration for advances made, and was still relied upon by those making the advances as a valid security. Such facts render the conduct of the junior encumbrancer fraudulent.

4. But there is no satisfactory proof of any fraudulent purpose, even in Miller and Baldwin. They no doubt regarded the contract under which the plaintiffs claim as wholly inoperative and of no benefit to the bondholders under it. And the testimony certainly does not convince me that Miller and Baldwin, at the time the second mortgage was executed, or when Baldwin accepted the $300,000 bonds, had any belief that even the first bondholders relied upon it. Baldwin was not conversant with the mode of negotiating these bonds. He came into the company after all that had transpired. And Miller was not familiar with the negotiation of the bonds. Every one connected with that transaction, who did communicate with Miller, spoke of them as of no validity, even Judge Smalley, the counsel of the company at the latter period. It was the most natural conclusion then for him to adopt that view, as he unquestionably did, and acted upon it in good faith, supposing it was the view of the bondholders themselves, under the first contract. And it is not improbable this might have been the view of the bondholders even, and that they would have accepted the provision made for them in the utmost good faith, under the second mortgage, but for the unexpected failure of the company.

After this they very naturally fell back upon the first imperfect attempt to execute a mortgage, as the only hopeful reliance, — *tabula in naufragio*, — literally a plank in a shipwreck. But, at all events, there is no ground of claim that there is any notice which can by any fair construction affect the interest of the present bondholders under the second mortgage. We are not, therefore, called upon to determine absolutely how far the circumstances might affect Miller or Baldwin.

XI. There seems to have been some reliance in the argument

for the plaintiffs before the Chancellor, upon the fact that the bondholders under the first contract obtained the indorsement of very reliable counsel in favor of the capacity of the company to execute the mortgage in question.

1. I am not aware that any such argument will avail the plaintiffs if the contract under which they claim shall finally prove defective and insufficient in law to maintain that priority of right upon which alone the plaintiffs will be able to maintain their bill.

2. But, unquestionably, the *omission* to make proper inquiry or to take advice of counsel upon contracts of great consequence and difficulty, and especially of novel and unusual character, might be regarded as a very significant circumstance, tending to show that the party did not act in good faith; but that they might rather have obtained the best security they could; trusting to the *uncertainties* of the law rather than its certainties. In this view of the case it has seemed rather wonderful to me, that after those to whom these first mortgage bonds were offered in exchange for iron had proposed to act upon the opinion of able counsel in Vermont, indorsing the validity of the mortgage, that opinion should only have extended to the power of the corporation to execute such a mortgage and the effect of using the common seal; and never have been asked, either as to the mode of conferring such power or the mode of its execution, which seem quite as important considerations affecting the validity of the security as any other. But the point is not very important, and there may be some further opinion indorsing the validity of the mortgage in its present form. If so, the wonder will be how any one could give such advice.

3. If such counsel was given it would seem to me the more wonderful, when it is considered, that the course pursued in executing the mortgage was in violation of all established practice, as well as legal precedent, and especially in contravention of the general statutes of the state, and the reported decisions of the courts. It is natural to suppose that an opinion from well-informed business men could not have failed to elicit the fact, that the instrument under which the plaintiffs claim, was wholly deficient in all the essential legal requisites of a valid

mortgage of real estate by a corporation, both as to its form and the power under which it was executed.

4. We do not infer, either from the omission to seek proper counsels, or the fact that rash and imperfect advice was given and acted upon, that any of the parties acted in bad faith. But the facts and circumstances may justly be regarded, perhaps, as affording pretty satisfactory evidence that the officers of the company regarded it as a temporary expedient to save the credit of the company at the time. Their great anxiety seemed to be to satisfy those of whom they purchased the iron, and *not* to be personally responsible upon the contract.

XII. The position of affairs called for despatch, and more or less of reserve, as to all parties.

1. The stockholders along the line of the road, who constituted about one tenth of the whole, and all who were really so, *bonâ fide*, and not identified with the promoters of the enterprise, had subscribed under the positive assurance that *no* mortgage should be executed. This, then, was reason enough why it would not be discreet to call a meeting of the stockholders. For any one of such subscribers might place an extinguisher at once upon the whole scheme of the mortgage, by an injunction out of chancery. It would, therefore, not be wise to wake up the suspicions of the stockholders more than was indispensable.

2. From this same consideration, the fact of any such mortgage ever having been attempted to be executed, has all along been studiously kept out of the written reports of the officers of the company to the stated or occasional meetings of the stockholders. It has been named in discourse, and in conversation, at such meetings; but always with the assurance that it was irregular and inoperative, as a mortgage; so that the reputation of its existence has been kept constantly shrouded with the shadow of its being of no force or binding effect upon any one. The votes of the stockholders, therefore, ratifying a subsequent mortgage, sufficient to meet all their indebtedness, is not in fact, or in construction of law, any confirmation of the first mortgage, but rather the condemnation of it as a security, and making provision for securing the debts of the company, by a mortgage

properly executed, which was, in fact and in law, and in the intention of the stockholders, *the first mortgage* ever created by them.

3. The consideration, too, that the getting up of this first contract was altogether a volunteer matter on the part of the directors, at the time, to brace up the contractors, in a mode not provided for in the contract, affords additional reason why those directors would not desire to give much publicity to the transaction at the time, and to keep up the impression among the outside friends of the company that it was merely a temporary expedient, and never fully carried into effect, and that all which was expected of the company was to make provision at the proper time for retiring the bonds.

4. All this, and much more which might be adduced, convinces me, beyond all doubt, that the officers of the company managed to get along as quietly as possible with the instrument under which the plaintiffs now claim, merely desiring to get it into such state of forwardness as to induce the sale of the iron, and thus maintain the credit of the company and the progress of the works, until the proper time came to secure all the liabilities of the company necessarily incurred in the construction and equipment of its road, by a formally executed first mortgage, and that they succeeded in accomplishing this without exciting much stir out of doors.

5. Perhaps it is not fair to conclude that the directors were fully aware of its manifold deficiencies, but if they were not, it was certainly attributable to their prudent reserve, in not inquiring of their counsel, who should have been able to inform them at once that such an instrument had been decided to be of no validity in this state or anywhere else, many years before. And this is either fraud or gross negligence.

6. And if the bondholders under this contract believed they had obtained the security of a first mortgage upon the property and franchises of the company, present and future, it was what few others could have ever believed, who knew all the facts in the case, and what the slightest inquiry in the proper quarter would have enabled them to correct. Under such circumstances it would be going further than any late decision in equity has

gone, and further than it ought ever to go, to declare that the bondholders under the first mortgage have acted altogether with that degree of watchfulness and circumspection requisite to enable them to demand the advantages of *bonâ fide* purchasers. They seem to me to be very much in the category of the officers, and all to have been guilty either of fraud or gross negligence.

XIII. And it would be going further than any case has ever gone, under such a lame show of equity on the part of the plaintiffs, to postpone the claims of the bondholders under the second mortgage, when there is not the shadow of proof that they had any knowledge, or any means of knowledge, of the existence of any prior claim of an encumbrance upon the property of the company. It has been decided that uncertain equities, resulting from doubtful constructions, are not such as to bind a *bonâ fide* purchaser having notice thereof.[33]

I conclude therefore, gentlemen, in all sincerity, and I believe in all justice and "impartiality," that you are bound to disregard the claim of the plaintiffs under what they call the first mortgage; and that in doing so you will be sustained by the ultimate decision of the court, affirming the decision of the Chancellor dismissing the bill.

There are many other grounds, upon which, if they stood alone, I should have great confidence that the court must decide against the claims of the plaintiffs upon those only. But these probably may be presented to the court by your counsel, and I have confined myself to such views as seemed to me most obvious and most decisive of the case, as I have always done in similar cases. And I should certainly be surprised, if they should not in the main be sustained by the court in disposing of the case.

[33] 2 Eden, 344; Parker *v.* Brooke, 9 Vesey, 588.

*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 given 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,

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]

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 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 Wisconsin R. 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 *bonâ fide* holder without notice to recover upon it. Madison & Ind. Railw. *v.* Norwich Savings Society, 24 Ind. R. 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.

[2] West Cornwall Railw. *v.* Mowatt, 17 Law, J. (Chan.) 366.

[3] Doe *v.* Jones, 5 Exch. 16.

3. But the company cannot set up, in defence of a security 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 *bonâ 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]

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 two of the joint holders, the third, having the custody of them, having made the transfer by deed,

[4] Horton *v.* Westminster Improvement Comm'rs, 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.

[7] Furness *v.* Caterham Railw., 27 Beav. 358.

the signatures of two of the grantees being forged by him, and the purchaser acting *bonâ fide* and paying full value, and after his purchaser had been admitted on the books of the company, as the owner of the debentures, the transfer was set aside 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.*

§ 237. 1. The company, where the capital is not limited in the charter, may from time to time issue new shares, and even give them a preference, probably, 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 shares, a majority of which they would themselves be entitled to hold, might be more questionable.[2]

[8] Cottam *v.* Eastern Counties Railw., 1 J. & H. 243; s. c. 6 Jur. N. S. 1367.

[1] Bates *v.* Androscoggin & Kennebec Railw., 49 Maine R. 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.* Evansville, in the agreement of a railway company to allow interest on stock subscribed; 15 Ind. R. 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.

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 the thing pledged, for the repayment of the money; but inquiries were directed.[5]

4. It seems questionable how far railway corporations 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]

[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 railroad 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 6 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 6 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., 7 Jur. N. S. 508.

[5] Furness *v.* Caterham Railw., 25 Beav. 614; s. c. 4 Jur. N. S. 1213.

McLaughlin *v.* D. & M. Railw., 8 Mich. R. 100. An important question

*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

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.

The concluding portion of the opinion is of sufficient importance to be given at length.

"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 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

appears to be a mere casualty. But he is always *primâ facie* liable for any such loss, and ultimately, unless he can show very

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

clearly that he was not in fault. By this is understood, commonly, that he invested and managed the fund as a prudent

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 1231, 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 defend-

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

ant answering this bill, and submitting themselves to its jurisdiction, certainly over the Messrs. Garrett & Sons, the agents here of said road, whose agreements, 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."

[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. R. 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, 10 Eng. L. & Eq. 123. In the case of Ellis *v.* Eden, 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.

[3] Kimball *v.* Riding, 11 Foster, 352.

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, 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.

Bonâ 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 *bonâ 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

[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 transfer-

Haven Railway.[2] The 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 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. R. 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. R. 496, it was held that the bond of a railroad corporation payable 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 *primâ 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 is held that coupon bonds of an incorporated company are transferable by delivery solely. And see Brookman *v.* Metcalf, 32 N. Y. R. 591.

But in Jackson *v.* York & Cumberland Railw., 48 Maine R. 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

*3. And in a very late case in the state of Mississippi, the question has been considered by their court of errors, in regard to the bonds issued by the city of Vicksburg,[9] and the conclu-

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 R. 507. This rule is contrary to the great majority of the cases. See County of Beaver *v.* Armstrong, 44 Penn. St. 63; Morris Canal & Boating Co. *v.* Fisher, 1 Stockton, Ch. 667; White *v.* Vermont and Massachusetts Railw., 21 Howard (U. S.), 575; Chapin *v.* Vermont & Massachusetts Railw., 8 Gray, 575. But in England railway bonds or debentures have not been considered as strictly negotiable. Athenæum Life Ins. Co. *v.* Pooley, 5 Jur. N. S. 129; s. c. 3 De G. & J. 294; Balfour *v.* Ernest, 5 Jur. N. S. 439. A distinction has been sometimes attempted between the right to bring an action upon the coupons and upon the bonds themselves. See Crosby *v.* New London, W. & P. Railw., 26 Conn. R. 121; Williamson *v.* New Albany & Salem Railw., 9 Am. Railw. Times, March 12, 1857, per *McLean*, J. But the principle of White *v.* Vermont & Massachusetts Railw., *supra*, makes any such distinction needless. 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. R. 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. R. 496; Conn. Mutual Life Ins. Co. *v.* C., C. & C. Railw., 41 Barb. 9.

[9] Craig *v.* The City of Vicksburg, 31 Mississippi R. 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.

But see *ante*, § 35, pl 4 and n. But see Athenæum Assurance Co. *v.* Pooley, 31 Law Times, 70; *ante*, § 234, n. 10.

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, who sued for an injunction, as a stockholder, on the ground that the indorsement

sion arrived 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 *bonâ 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 conclu-

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," *primâ 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 *bonâ 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 R. 59; Madison & Indiana Railw. *v.* Norwich Savings Society, 24 Ind. R. 457.

[10] And coupons on such bonds cannot be attached on trustee process. Smith *v.* Ken. & Portland Railw., 45 Maine R. 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.

sion reached, that railway bonds issued in blank, no payee being named, but delivered to a citizen of Massachusetts for value, and having passed 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 *bonâ 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 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 *bonâ 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 Jur. N. S. 439.

[15] Crosby *v.* New L. W. & P. Railw. Co., 26 Conn. R. 121. See also Shoemaker *v.* Goshen, 14 Ohio St. 569.

[16] Athenæum Life Ins. Co. *v.* Pooley, 5 Jur. N. S. 120. *Ante*, § 234.

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 *bonâ 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. R. 362.

[18] Scott *v.* Colburn, 26 Beavan, 276; s. c. 5 Jur. N. S. 183.

[19] De Winton *v.* Mayor of Brecon, 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, 4 Eng. L. & Eq. 113; Stevens *v.* South Devon Railw., 12 Eng. L. & Eq. 229; *ante*, § 211.

[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 St. 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 stockholder, he may claim it in an action of money had and received to his use

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]

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., 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, 8 W. R. 699.

[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 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, 8 Jur. N. S. 299. And see, as to the apportionability of dividends under the English practice, Maxwell *in re*, 9 Jur. N. S. 350; Scholefield *v.* Redfern, 9 Jur. N. S. 485.

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]

[5] Perrin *v.* Fireman's Ins. Co., 22 Ala. R. 575.

[6] State *v.* Baltimore & Ohio Railw., 6 Gill, 363; Ohio City *v.* Cleveland & Toledo Railw., 6 Ohio St. 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 scrip holders, 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 suf-

*2. In the case just cited, the former owner of the stock learned of the fraudulent transfer some months before he inquired, 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 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

formed the * company, and in the mean time the offender left the country, and this was held no bar to his claim to the dividends.

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 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., 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., 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.

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]

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 *bonâ 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

[2] Pollock *v.* The National Bank, 3 Selden, 274; Sabin *v.* The Bank of Woodstock, 21 Vt. R. 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.

[3] Stebbins *v.* Phœnix Fire Ins. Co., 3 Paige, 350.

[4] Henning *v.* New York & New Haven Railw., 9 Bosw. 283.

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 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

[1] Struthers *v.* Clark, 10 Am. Railw. Times, No. 21. Supreme Court of Penn. 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 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 guaranty 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."

one which would have produced the specified dividends for the term named in the contract.[2]

[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 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."

*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 fran-

[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. R. 192.

[2] *Ante*, § 204.

[3] Angell & Ames on Corp. § 771, and cases cited; Smith *v.* Steamboat Co., 1 How. (Miss.) 479.

chises, and the acceptance of such surrender.[4] But the mere non-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

[4] Angell & Ames, § 772; 2 Kent's Comm. 310, and notes; Missouri and Ohio Railw. *v.* State, 29 Ala. R. 573.

[5] Town *v.* Bank of River Raisin, 2 Doug. (Mich.) 530; McMahan *v.* Morrison, 16 Ind. R. 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. R. 353.

[6] Ang. & Ames, § 774. The Eastern Archipelago Co. *v.* Reginam, 22 Eng. L. & Eq. 328, in Exchq. Ch.; s. c. in Q. B. 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 thus relinquish 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. R. 261, it is held that a railway corporation, chartered to operate a railroad between A. & B., cannot legally operate it between A. & C. only, C. being a way station between A. & B., and

forfeiture of 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 liability of the shareholders beyond the amount of their subscriptions, in the

abandon that part of the route lying 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 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. R. 353.

[7] State *v.* Fourth N. H. Turnpike Co., 15 N. H. R. 162; Young *v.* Harrison, 6 Ga. R. 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. R. 327; Illinois Central Railw. *v.* Rucker, 14 Ill. R. 353; People *v.* Bank of Pontiac, 12 Mich. R. 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. R. 28; 23 Wendell, 222; 11 Ala. R. 472; Brookville & G. Turnpike Co. *v.* McCarty, 8 Ind. R. 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 R. 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 R. 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. R. 1.

[8] See Blake *v.* Concord & Portsmouth Railw., 39 N. H. R. 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.

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 * 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

[9] *Post*, § 244. And see Hoffman *v.* Van Nostrand, 42 Barb. 174.

[10] Nockels *v.* Crosby, 3 B. & Creswell, 814; Walstab *v.* Spottiswoode, 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 recent case in Georgia, Sisson *v.* Matthews, 20 Ga. R. 848, s. c. 17 Ga. R. 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

to pay his 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 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.

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 (vol. 1).

[14] Clements *v.* Bowes, 21 Eng. L. & Eq. 471; s. c. 8 Eng. L. & Eq. 238; Upfill's case, 1 Eng. L. & Eq. 13.

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]

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 re-

[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, 5 Eng. L. & Eq. 114. But he is not a contributory for expenses, unless he authorizes them. Id. 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.* Cobhold, 1 Exch. 798.

[18] Bennett, *ex parte*, 27 Eng. & L. Eq. 272.

[19] Goodwin *v.* McGehee, 15 Alabama R. 232.

served to repeal the charter, and the right is accordingly exercised, courts will *primâ 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 *bonâ fide* forfeiture of shares, whether confirmed by the company or not, if acquiesced in by the share-owner and the company, 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 *bonâ 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 *bonâ 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

[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., 5 Jur. N. S. 400.

[22] Home Life Ass. Co. *in re*, *ex parte* Wollaston, 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.

shares to a *bonâ fide* purchaser.[27] And 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 corporator, 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]

[27] Worth, *ex parte*, 4 Drew., 529; s. c. 5 Jur. N. S. 504.

[28] Ayres, *ex parte*, 25 Beavan, 513.

[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.

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 shown than the mere return of *nulla bona*, as to the company. *Bonâ 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]

[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 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. & W. Railway, *supra;* s. c. 29 Eng. L. & Eq. 341.

[3] Devereux *v.* Kilkenny, &c. Railw., 1 Eng. L. & Eq. 481. In this case, while

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

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.

[4] 1 Bennett's Shelford, 224; Hodges on Railways, 92.

[5] Devereux *v.* Kilkenny, &c. Railway, 1 Eng L. & Eq. 481; Walford, 236.

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 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

[6] Bill *v.* Richards, 2 Hurls. & N. 311.

[7] Nixon *v.* Brownlow 3 H. & N. 686.

[8] Rastrick *v.* Derbyshire, Staf., & Worcestershire Railw., 24 Eng. L. & Eq. 405.

[9] Reg. *v.* Derbyshire, Staffordshire, & Worcest. J. Railway, 26 Eng. L. & Eq. 101.

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 them, 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

[10] McKenyon *v.* Shannon Railw. Co., Weekly Reporter, 1854 – 5, p. 10.

[11] Shedden *v.* Patrick, 1 McQueens H. L. Cas. 535; Edwards *v.* Railway, 2 Com. Bench N. S. 397. See Scott *v.* Uxbridge & R. Railw. 12 Jur. N. S. 602.

[12] Came *v.* Brigham, 39 Maine R. 35; Donworth *v.* Colbaugh, 5 Clarke, 300; Cummings *v.* Maxwell, 45 Maine R. 190; Milliken *v.* Whitehouse, 49 Maine R. 507; New England Bank *v.* Stockholders of N. S. F., 6 R. Island R. 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. R. 388; Moss *v.* Oakley, 2 Hill, 265; Moss *v.* McCullough, 5 Hill, 131. And in Shaler & Hall Quarry Co. *v.* Bliss, 27 N. Y. R. 297, it was held that the statute liability of a trustee of a manufacturing company, who was in 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. R. 52; 5 Conn. R. 28; 10 Conn. R. 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.* Abindroth, 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

such action the 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]

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. Id.

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. Id. 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 recent 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 *primâ 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 "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. R. 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. R. 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

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]

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 R. 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. Court of Appeals, 377. And in Cummings *v.* Maxwell 45 Maine R. 190, it was held that the remedy which creditors of a corporation have against the individual members for 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 R. 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

4. In Pennsylvania,[14] under a statute making the shareholders * liable to the creditors to the amount of their unpaid subscriptions, 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

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 R. 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 R. 530; Coffin *v.* Rich, 45 Maine R. 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.

[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.

[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. R. 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. Id.

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 stockholder 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]

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, *primâ 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 re-

[15] Force *v.* Tanning & Leather Company, 22 Ga. R. 86. See also Robinson *v.* Beall, 26 Ga. R. 17.

[17] Patterson *v.* Wyomissing Manufacturing Co., 40 Penn. St. 117.

[18] Boyd *v.* Chesapeake & Ohio Canal Co., 17 Md. R. 195.

[19] Hudson *v.* Carman, 41 Me. R. 84. But such judgment would not be evidence against a shareholder whose liability was concurrent with that of the company.

turn 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]

[1] Warner *v.* Mower, 11 Vt. R. 385; Whitwell *v.* Warner, 20 Vt. R. 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. Court of App. 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. Ct. of App., 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 Stockton 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 Rhode Island R. 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 pro-

ceedings 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. Id.

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

[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, Weekly Reporter, p. 330, 1853 – 4. And the Board of Trade may originate prosecutions for violations of their orders. Hodges, 554.

without the proper order of the board. For the purpose of enabling the board to perform their duties, they have power at all 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

[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, 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.

give the company power to build a bridge or make such other arrangements as the nature of the case shall require.[4]

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]

[4] 5 & 6 Vict. c. 55, § 13. *Ante*, § 108.

[5] Newry & Enniskillen Railway *v.* The Ulster Railway, 39 Eng. L. & Eq. 553.

[6] 17 & 18 Vict. c. 21.

[7] Bassett *v.* Great Northern & Great Midland Railways, 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

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

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 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 seems 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

subjects connected with the public interests, such as the aggregate traffic in cattle and goods respectively, and also in passen-

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 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 consequen-

gers, according 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]

ces 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 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 there 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,

[1] *Ante*, § 232.

[2] See Great Western Railway *v.* Decatur, 33 Ill. R. 381; State *v.* Noyes, 47 Maine R. 189; State *v.* Jersey City, 5 Dutcher, 170; Branson *v.* Philadelphia, 47 Penn. St. 329.

[3] 17 & 18 Vict. c. 31.

and to give 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.*

§ 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 R. 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. R. 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 railroad 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 Railroad Company, it was provided that nothing contained therein should authorize the construction of their railway tracks in or along any of the streets of the City of New York, without the consent of the mayor, etc., 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 appli-

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]

cation of the company, an ordinance was adopted by the mayor, etc., permitting the track to be laid in certain streets, but providing, that if, after its construction, it should, in the opinion of the mayor, etc., 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, etc., 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 railroad 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, etc., 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 railroad company; that granting permission to lay the track did not deprive the mayor, etc., of the right afterwards to regulate its use by the company; that the agreement of the company was valid as 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. R. 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.

3. By general statute, in England, the railway companies are to bear the expense of a reasonable police force, during their construction, 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.

[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 proceeding for vacating it; and that the Attorney-General was improperly joined, and 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 railroad, 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.

"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 incompetent 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 require. 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.

[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

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. 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]

to a tariff to be fixed by the common council. Brown *v.* Duplessis, 14 La. Ann. 842.

[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 railroad by a turnout and track, is not such a contract as will prevent the city from abandoning or removing said railroad, 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.

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] where the following propositions are maintained:

[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 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

That the laying down of a railway in a public street, by permission of the municipal 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.

*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]

its ordinary and legitimate use. I think, therefore, that the principle laid down in Regina *v.* The Longton Gas Co., 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, 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.

[1] Public baggage, stores, &c., sent in charge of troops, must be considered as the baggage of such troops, under the English statutes, and must be carried by

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.[1]

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.

[1] Collett *v.* London & North W. Railway, 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 com-

5. Almost precisely the same point was decided in a late case[2] 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.[3]

pany to carry the mail-bags and the officers of the post-office in 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 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. 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.

[2] Nolton *v.* Western Railway, 10 How. Pr. R. 97.

[3] 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

[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 DeG. J. & Sm. 29.

not the whole line, as specified in the act, the remaining portion being that which 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., 6 Eng. L. & Eq. 328.

[3] 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 Stockton, 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 St. 119. The act of amalgamation is not void, but voidable at the election of shareholders. McCray *v.* The Junction Railw., 9 Ind. R. 358. Stock subscriptions are thereby released. Ib. In State *v.* Bailey, 16 Indiana R. 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 Indiana R. 172. Where two railroad companies, in an agreement for consolidation, inserted an article to provide for the completion and running

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]

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 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 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 & Indiana Railway, 6 Ohio St. 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 Wendell, 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. R. 377.

[7] Charlton *v.* Newcastle & Carlisle Railw. Co., 5 Jur. N. S. 1096.

[8] Ware *v.* Regents Canal Co., 5 Jur. N. S. 25.

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 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.*
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 com-

[1] The Shrewsbury & B. R. *v.* Stour Valley, and The London & N. W. R., 21 Eng. L. & Eq. 628; Midland G. W. R. of Ireland *v.* Leech, 28 Eng. L. & Eq. 17.

pany 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, 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 suit 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]

[1] London, Br. & S. C. Railway *v.* Goodwin, 3 Exch. R. 320; s. c. 6 Railw. C. 177. And the same point is so ruled in Eastern Union Railway *v.* Cochrane, 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.

[2] Eastern Union Railway Co. *v.* Cochrane, 24 Eng. L. & Eq. 495. And see Robertson *v.* Rockford, 21 Ill. R. 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, and Baltimore Railway *v.* Howard, 13 How. 307. And see McMahan *v.* Morrison, 16 Ind. R. 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 railroad 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 railroad running from Eaton, Ohio, to the state line of Indiana, in the direction of Richmond, were, by virtue of laws of these respective states, con-

¶ 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

solidated 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 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. R. 457.

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 effect of such proceedings, and, although the proceeding 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 of two or more consolidated railway companies may make a valid mortgage of its property for its own debts, even after the consolidation.[8]

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 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.[9]

[6] Cork and Yougal Railway *v.* Patterson, 18 C. B. 414. See *ante*, § 56, n. 1.

[7] Platt *v.* N. Y. & Boston Railw., 26 Conn. R. 544.

[8] Wright *v.* Bundy, 11 Ind. R. 398.

[9] Wamsebuk Railw. Co. *v.* Tronsdale, 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

[1] Marshall *v.* Baltimore and 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. 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 R. 23; s. c. 1 Grant's Cases, 420.

[3] Northern Indiana Railw. *v.* Michigan Central Railw., 15 How. (U. S.) 233.

railway 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 corporation doing business in the State of Michigan. Where the

See Wheeden *v.* Cam. and Amboy Railw., 2 Philadelphia R. 23; s. c. 1 Grant's Cases, 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.

[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 railroad 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. R. 492. And see, as to foreign corporations, Boley *v.* Ohio Life Ins. & Trust Co., 12 Ohio St. 139; Sprague *v.* Hartford, Providence, & Fishkill Railw., 5 Rhode Island R. 233. See, as to jurisdiction of state courts over matters pending in the federal courts, Ohio & Miss. Railw. *v.* Fitch, 20 Ind. R. 498.

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 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]

[5] Northern Ind. Railw. *v.* Mich. Cent. Railw., 5 McLean's C. C. 444. See also Woolsey *v.* Dodge, 6 Id. 142.

[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, 30 Law Times, 357.

[1] Chamberlaine *v.* Chester Railway, 1 Exch. R. 870.

*SECTION III.

Mode of reckoning Time.

1. *Difference between that of England and America.*

§ 257. 1. 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 should be competent to summon the company, 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] *In re* Jennings, 1 Irish Eq. (N. S.) 236; Hodges, 107.

[2] Bigelow *v.* Wilson, 1 Pick. 485, opinion of *Wilde*, J.

[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 R. 260. For the practice in Ohio, see Fee *v.* Big Land Iron Co., 13 Ohio St. 563. These matters are generally regulated by statute in the different states. Dixon *v.* Hannibal and St. Joseph Railw.,

31 Missouri R. 409; Farnsworth *v.* Terre Haute, Alton, & St. Louis Railw., 29 Id. 75; Sprague *v.* Hartford, Providence, & Fishkill Railw., 5 Rhode Island R. 233; Sullivan *v.* La Crosse & Minn. Packet Co., 10 Minn. R. 386; New Albany & Salem Railw. *v.* Tilton, 12 Ind. R. 3; Ohio & Miss. Railw. *v.* Boyd, 16 Ind. R. 438; Peoria Ins. Co. *v.* Warner, 28 Ill. R. 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 R. 298. See Taft *v.* Mills, 5 Rhode Island R. 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 R. 41; Ohio & Mississippi Railw. *v.* Quier, 16 Ind. R. 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.

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 everything 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]

Indebitatus assumpsit is a proper form of action to recover money due upon subscription to stock in a railway.[2]

[1] Smith *v.* Eastern Railw., 35 New H. R. 356; Oldfield *v.* N. Y. & Harlem Railw., 4 Kernan, 310.

[2] Peake *v.* Wabash Railw., 18 Ill. R. 88.

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.

[3] New Albany Railway *v.* Grooms, 9 Ind. R. 243.

[4] Welland Railw. *v.* Blake, 6 H & N. 410.

NOTES.

NOTE I. TO § 235, *ante*, pp. 507 *et seq.*

Right of Commonwealth of Massachusetts to take possession of the Troy and Greenfield Railway.

1. *Possession of Commonwealth valid. Foreclosure in ten years after the road is finished and in operation will result from the surrender.*
   (1.) *This will not affect the interest under the Smith mortgage. That can only be foreclosed in a court of equity.*
   (2.) *The term of redemption extended to the company will give the same term to intermediate encumbrancers.*
2. *The title of Commonwealth unquestionable to the extent of* $2,000,000.
   (1.) *Ordinarily, mortgages for future advances only create lien as advances are made.*
   (2.) *Here the Commonwealth was bound to make the advances, and the encumbrance was absolute to that extent in the first instance.*
   (3.) *The Smith mortgage being made in terms subject to that of the Commonwealth, to the extent of* $2,000,000, *they can make no objection to that mortgage, or to the right to advance* $2,000,000 *under it.*
   (4.) *And the subsequent mortgages are an effectual confirmation of the title of the Commonwealth on the part of the company.*
3. *The matter stated more in detail.*
   (1.) *The statute giving the power to mortgage the franchise to the Commonwealth, any change of location, and all after-acquired property pass, both as incidents of the main thing and by the terms of the statute.*
   (2.) *The rule of law against executing a valid mortgage of future acquisitions has no application where the statute confers such a power.*
   (3.) *It has been made a question how far the alteration or repeal of the act of* 1854 *may have postponed the mortgage of the Commonwealth.*
   (4.) *The alterations seem to have been made at the instance of the company and the contractors, and for their relief, and will not therefore prejudice their rights.*
   (5.) *But no subsequent mortgagee can insist upon the rights of a strict surety, and that the terms of the first mortgage shall remain.*
   (6.) *He is not a surety for the debt secured by the prior mortgage, and cannot complain of any change in the securities, if the amount is not increased.*
   (7.) *The form of the bond and mortgage is valid under general statutes.*
   (8.) *It is expressly required, in that form, by the act of* 1854.
4. *The subsequent mortgages to the Commonwealth convenient, but not indispensable.*
5. *The questions arising on the Smith mortgage are such that it is impossible to give reliable advice in regard to them all.*
   (1.) *It is important to inquire whether the bonds are valid or negotiable instruments.*
   (2.) *Statute requires them to be payable in twenty years, and not to exceed capital paid in.*

(3.) *This requirement is of binding obligation upon the company, in issuing these negotiable securities.*

(4.) *Railways may probably, without special authority for the purpose, execute negotiable instruments, such as bills of exchange and promissory notes.*

(5.) *But the thing here provided for is the addition of funded capital, to the amount of the previous stock capital.*

(6.) *A limitation was therefore placed upon this power of making funded capital.*

1. *Should only be done for funding floating debt, and borrowing money for purposes authorized by law.*
2. *The funded capital thus created should not exceed stock capital in money.*
3. *The securities should not extend beyond twenty years, or bear interest over six per cent, or be in sums less than* $ 100.

(7.) *The powers of the company are thus clearly defined, and contain an implied denial of the power of raising funded capital in any other mode. The bonds are therefore* ultra vires, *and void, as to the company.*

(8.) *They are of no more force in the hands of* bonâ fide *purchasers. So held in England.*

(9.) *The defect of authority is apparent upon the face of the instruments, and he who takes the security of a corporation must look to its powers.*

(10.) *The bonds therefore void in the hands of every one.*

6. *It may be claimed that the mortgage should be upheld as a security for the debt of the contractors, without regard to the bonds.*

(1.) *The general rule is that the mortgage is security for the debt.*

(2.) *Contracts* ultra vires *are simply void, not illegal.*

(3.) *Courts not expected to extend the rule to this transaction.*

(4.) *Mortgage must probably perish with the bonds.*

(5.) *But if the mortgage should be upheld independently of the bonds, it will be merely for the benefit of the contractors.*

(6.) *English case favoring this construction.*

(7.) *Mortgage then solely under control of contractors.*

(8.) *Requisite in this view to inquire into the power of railway companies to execute valid mortgages, without express legislative sanction.*

(9.) *English rule, and probably true one, that no such power exists.*

(10.) *But legislative sanction may be implied, or given after the deed.*

(11.) *And without this, a company having the power to take tolls, may create such a lien upon its property as to give a lien upon its tolls in equity, to be enforced through receiver.*

(12.) *This was the general opinion certainly at the date of this mortgage. More recently the tide sets somewhat against it.*

(13.) *At date of this mortgage, was probably some reason to say that the legislation of this State did make the franchise of taking tolls by railway companies alienable for the security or payment of debts.*

1. *The statute allowing the franchise of any corporation for taking toll to be attached on mesne process, and sold on execution, certainly treats this species of property as alienable for security or payment of debts.*
2. *But the provisions of the General Statutes as to railway mortgages still more strongly imply the general power to mortgage the franchise of taking tolls.*
3. *These provisions can only be made reasonable by being treated as limitations upon the general right of such corporations.*
4. *General course, to leave restrictions upon special acts, to those acts.*
5. *Probable that the general course of legislation in this State had made the roads, equipments, and franchises of railway companies alienable by these companies for the security of debts.*

(14.) *But if the courts should hold the mortgage operative only upon the personal property, and that part of the road-bed and superstructure owned by the company at the date of the deed: —*

(15.) *This would give the second mortgagees the right to redeem the first mortgage, and the Commonwealth might be bound to treat it as a subsisting encumbrance, unless it is void upon the grounds above stated.*

7. *Brief statement of legal force of other liens.*

(1.) *Attachment of iron, as property of Haupt & Co., not valid.*

(2.) *Grounds of this opinion explained.*

(3.) *But statute of* 1862 *may include this claim upon the iron.*

(4.) *But only to extent of appropriation, and upon full relinquishment.*

(5.) *Claim of Conn. River Railway for freight of the iron comes within equity of statute of* 1862, *and probably should be paid to same extent as other claims. But the carrier's lien has probably been waived.*

(6.) *Difficult to say how far provisions of statute of* 1863 *apply. Probably intended to apply.*

8. (1.) *The second mortgagees, if their mortgage is valid, may redeem the first mortgage at any time before the foreclosure of their rights.*

(2.) *The consent of the contractors to the surrender of the road to the Commonwealth would postpone any claim on their part, till after the whole sum necessary to be advanced in completing and equipping the road, whether beyond* $2,000,000 *or less.*

(3.) *Contractors bound by terms of their consent to same extent as company by surrender. Smith mortgage thus postponed to all claims on part of Commonwealth, to full extent of furnishing and equipping the road.*

9. *Validity of Mr. Bartlett's attachment dependent upon whether the franchise of a railway company for taking tolls is assignable or alienable for the benefit of creditors.*

10. *Smith mortgage and Bartlett attachment possible clouds upon title of Commonwealth. Desirable to obtain opinion of Supreme Judicial Court in regard to their validity.*

(1.) *Court would not probably regard this case as proper to be referred to them by executive or legislative department of the government.*

(2.) *But specific provisions of constitution on the subject reach this case, unless it is to be excepted on special grounds.*

(3.) *The importance of having these adversary rights determined will recommend the matter to the most favorable consideration of the court.*

(4.) and (5.) *Application to the court in equity recommended.*

(6.) *Subsequent encumbrancers should be notified before expenditures made by the Commonwealth beyond the* $2,000,000.

(7.) *Permanent erections made by mortgagee in possession, not ordinarily valid charge.*

(8.) *Should the Commonwealth go forward and finish the road and put it in operation, and equity allow other parties to redeem, they would probably be required to repay all such expenditures.*

(9.) *But one case of railway mortgage foreclosure in this State.*

§ 260. The following opinion in regard to the title of the commonwealth to the property and franchises of the Troy and Greenfield Railroad Company, under the surrender thereof made by the corporation to the commonwealth according to the statute of 1862, ch. 156, as against the bondholders under the prior mortgage to Smith and others, having been substantially adopted by the decision of the Supreme Judicial Court of Massachusetts,[1]

[1] Commonwealth *v.* Smith, 10 Allen, 448. This was a bill in equity, seeking to impeach the validity of a mortgage made July 30, 1855, to the defendants, by

is deemed of sufficient importance to be here presented to the profession.

the Troy and Greenfield Railroad Company, covering by its terms the franchise, railroad, and all other property of the corporation, then owned or thereafter to be acquired, to secure bonds to the amount of $900,000, to be issued to the contractor as part compensation for constructing the railroad, payable in thirty years from date. The mortgage recited the provisions of a contract for the construction of the railroad, dated December 30, 1854, to the effect that such bond should be given; and it was made subject to a prior mortgage to the Commonwealth, to secure state bonds to the amount of $2,000,000, which the Commonwealth were to issue, under the provisions of statute 1854, ch. 226.

The following facts were agreed: Since the execution of the mortgage to the defendants, the Commonwealth have received two other mortgages upon the railroad and franchises of the Troy and Greenfield Railroad Company, one of which was dated on July 6th, 1860, and the other on March 5th, 1862, and also surrender of all their property from the corporation, subject to redemption under statute 1862, ch. 156. On the 4th of September, 1862, the Commonwealth took possession of the mortgaged premises in various towns, for breach of condition. The Commonwealth, under their mortgages, have, at various times, from October, 1858, to July, 1861, advanced to the Troy and Greenfield Railroad Company large sums of money, amounting in all to several hundred thousand dollars. The corporation, under their mortgage to defendants, have, at various times, from August, 1855, to July, 1861, issued bonds to the amount, in all, of $600,000, payable in thirty years from date. All these bonds were issued in good faith, and are held by *bonâ fide* holders, and the corporation have issued no other bonds than the above. Before advancing any money to the corporation, the Commonwealth had actual notice of the execution of the mortgage to the defendants, and of the fact that a number of bonds had been issued under the same. The amount of capital stock of the corporation actually paid in December, 1856, was $143,905.77.

Hoar, J., delivered the opinion of the court.

"The question whether the mortgage made to the defendants by the Troy and Greenfield Railroad Company is of any validity, requires the court to give a construction to the provisions of St. 1854, ch. 286. To ascertain what the legislature intended to authorize or prohibit by that statute, it will be expedient to consider first what were the powers of railway companies in relation to the issue of bonds, and the making of mortgages, at common law, or before the statute was enacted. There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special stipulation to that effect, unless restrained by some restriction, express or implied, either in its charter or in some other legislative act. A bond is merely an obligation under seal. A corporation, having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual

1. In regard to the possession of the commonwealth under their mortgage, it is unquestionably regular and valid, and by the

and peculiarly appropriate form of corporate agreement. The general power to dispose of and alienate its property is also incidental to every corporation not restrained in this respect by express legislation, or by 'the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter.' Treadwell *v.* Salisbury Manuf. Co., 7 Gray, 404.

"But in the case of a railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this purpose under the right of eminent domain; whose powers are to be exercised by officers expressly provided by statute; having public duties, the discharge of which is the chief motive of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body of its own will. Such a franchise is not in its nature transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And, although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation, after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in existence depends upon the due performance of its public duties. Having once established its road, if that and its powers of managing, using, and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot at its pleasure alienate its railroad, and procure another. The whole reasoning of the court in Whittenton Mills *v.* Upton, 10 Gray, 582, in which it was held that a manufacturing company has no power to enter into a contract of partnership, applies with much greater force to the transfer of its franchise by a railroad company.

"No case has been cited in which the exercise of such a power has ever been judicially sanctioned in this Commonwealth, where there was not legislative authority for it; and the cases in which the legislature has expressly conferred the power, or confirmed its exercise, furnish at once a strong implication that the power would not otherwise exist, and afford a solution of the allusion to railway mortgages which occurs in the statutes.

"Coming, then, to the consideration of the act of 1854, we find it entitled, 'An act to authorize railway companies to issue bonds.' The first section recites the purposes for which a railroad corporation may issue bonds, namely, 'for the purpose of funding its floating debt, or for money which it may borrow for any purpose sanctioned by law.' This is, on its face, merely permissive. But it presents this alternative of construction. Either the corporation did not, in the

terms of the surrender an absolute foreclosure of the rights of the company will follow, unless they redeem, by paying all expendi-

opinion of the legislature, have the right to issue bonds, without the permission, in which case all the conditions and limitations attached to the privilege must be held to qualify and define the permission given; or, if the full right existed when the statute was passed, then it seems impossible to give any other sensible meaning to its provisions, except to construe it as prescribing the conditions and limitations under which the power might thereafter be exercised. The question is, Did the legislature intend that these companies should be authorized to issue bonds only in the mode and for the purposes authorized by the statute? If that intention is apparent, it makes no difference whether the language is affirmative or negative. The same section, then, contains two provisions: first, that the issue of bonds shall be authorized by a majority of the stockholders, at a meeting called for that purpose; and secondly, that the amount of bonds issued shall not exceed the amount of capital actually paid in. The second section provides, that such bonds may be issued in sums of not less than one hundred dollars each, payable at periods not exceeding twenty years from the date thereof, and at a rate of interest not exceeding six per centum per annum, payable annually or semi-annually. The language is still affirmative and permissive, but strictly limiting the nature and extent of the act allowed. The third section enacts, that no railroad corporation, having issued bonds under the provisions of the act, shall make or execute any mortgage upon its road, franchise, equipment, or any of its property, without including in and securing by said mortgage all such bonds previously issued, and all other pre-existing debts and liabilities of said corporation. This section certainly implies that a railroad corporation may mortgage its road and franchise under some circumstances, but gives no direct authority to make such a mortgage; and it plainly prohibits any mortgage that does not conform to the rule imposed. The fourth and fifth sections provide securities for the correct issue of the bonds, and for making them binding on the corporation, though sold at less than par.

"The court are all of opinion that the statute was intended to prescribe the terms and conditions on which railroad corporations should henceforth be allowed to issue bonds, and that any bonds which have been issued since its passage, and which do not conform to those conditions, are made in violation of law, and are therefore void. We cannot suppose that the legislature intended to pass an act to make legal the issue of certain bonds which the corporations had full power to issue without such authority, and which would leave all other bonds of equal validity. It must be remembered that these corporations are bodies created for public purposes, that their charters are made subject to repeal or alteration at the pleasure of the legislature, and that the Commonwealth has reserved full power to regulate and control their action by general or special laws. The language of the statute is in substance this: 'Such are the bonds which railroad corporations may henceforth issue.' To declare that bonds may be issued on certain fixed conditions, is, in effect, to declare that they shall not be issued in any other manner.

tures on the part of the commonwealth, within the term limited, ten years after the road is finished and in operation.

(1.) In regard to the effect of this surrender to the commonwealth upon any rights existing under the subsequent mortgage

"That bonds issued in violation of a statute are void, was held in a recent case in the Queen's Bench of England, Chambers *v.* Manchester & Milford Railw., 26 Law Reporter, 583. The prohibition in the statute, on which that case depended, was more direct, but the principle applicable to it is the same, and rests on strong foundations of justice and reason.

"The bonds issued by the Troy and Greenfield Railroad Company, for securing which the mortgage held by the defendants as trustees was made, are payable at a period exceeding twenty years from their date, and were issued to an amount very largely in excess of the amount of capital stock actually paid in. The legislature did not mean that such bonds should be made. Their illegality is apparent upon their face, and open equally to the knowledge of the party who issued and the party who received them.

"The bonds being illegal, the mortgage to secure them is illegal also. It becomes unnecessary, therefore, to consider the questions which have been so largely and ably discussed in the argument, to what extent the power to make a mortgage of a railroad has been recognized, or exists by implication under our statutes, and especially whether such a power has been conferred to any extent by the statute of 1854. But it may be well to observe, that the object of that statute seems to have been exclusively the regulation of the issue of bonds by railroad corporations, and that mortgages are only mentioned incidentally, with reference to the future security of the bonds, and not with any view of defining or extending the general power of making mortgages. And further, we understand the bonds which are the subject of the statute to be only bonds for the payment of money constituting a funded debt of the company, and do not consider the opinion which we have expressed to have any application to bonds of a different character, and intended for other purposes, such as bonds to dissolve an attachment, for the conveyance of land, or the like. Nor do we mean to decide that some of the provisions of the statute may not be merely directory.

"We find no evidence that the Commonwealth has ever known or sanctioned the illegal and irregular issue of these bonds, either directly or by implication. Nor do we think that they fall within the class of cases in which it has been held, that a violation of corporate powers cannot be taken advantage of collaterally. The second mortgage to the Commonwealth gives it a direct interest in the property; and not being expressly made subject to any prior encumbrance, gives the right to maintain and prove that the supposed conveyance to the defendants was illegal and void. The result to which the point decided leads is this: That the defendants, having no title which they can maintain against either of the mortgages to the Commonwealth, the plaintiffs have a plain, complete, and adequate remedy at law for any interference with the mortgaged property, and the bill must be dismissed."

to Smith and others, I do not understand that it was taken with any such purpose, or that it was expected by any of the parties to have any such effect. If not so intended and understood by the parties, it would not have that effect. The general provisions of the statute in regard to foreclosure of mortgages upon any real estate, have no proper application to the foreclosure of mortgages upon railways. The only proper mode of foreclosing a railway mortgage, I should suppose, would be by bill in a court of equity, where the rights of all parties can be secured by proper orders.

(2.) I should regard the giving of ten years to the company for redemption, after the completion of the road, as having the effect practically to extend the right of redemption on the part of subsequent encumbrancers for the same time. This may not be the strict legal effect of such a provision, but it comes very little short of that. But in any view of the right of a court of equity to require the second mortgagees to redeem from the commonwealth at an earlier date than that fixed by contract between the commonwealth and the mortgagors, which I should seriously question, it is certain that the practice of that court is to give subsequent encumbrancers the election to redeem from prior encumbrancers after the rights of the mortgagors are effectually foreclosed, and I have no doubt it would be given in this case.

2. In regard to the title of the commonwealth under its several mortgages, I have made very careful examination, and spent a good deal of time in turning the matter over in my mind so as to be able to see it in all its bearings; and it seems to me most unquestionable, to the extent of the $2,000,000.

(1.) If this were an ordinary mortgage to secure future advances, it would be considered optional with either party whether to continue such advances; and in such case the execution of a second mortgage will bind the property, the same as the first, except as to advances made before that time.

(2.) But here there was, undoubtedly, an expectation and desire in the minds of both the mortgagor and the second mortgagees, that the advances under the first mortgage should be continued to the full amount of $2,000,000. And the commonwealth was bound, by that imperfect obligation at least by which alone sovereign states are ever bound, to make the advances to the full extent of $2,000,000, provided the company complied

with the conditions of the act of 1854, by which they were agreed to be made, or with such qualifications of those conditions as might be agreed upon between the commonwealth and the company, and should not be detrimental to other parties incidentally interested. This, therefore, made the binding obligation of the first mortgage to the commonwealth the same as if they had executed a bond to advance the whole of the $2,000,000 in scrip. It therefore became a binding encumbrance to that extent, provided the scrip was afterwards advanced, in such a manner as to be acceptable to the company, and not to increase the encumbrance above that sum. This has been often decided.[2]

(3.) And the fact that the Smith mortgage is made expressly subject to this mortgage, to the full amount of the $2,000,000, removes all objection on the grounds of any defect in the first mortgage or the amount of the advances to be made under it, so far as the Smith mortgage is concerned. So that, if the first mortgage had been executed without any proper authority on the part of the company, or had been defectively executed in point of form, it being declared a valid mortgage to the extent of $2,000,000 by the subsequent mortgage, that would have made it so as to that mortgage.[3]

(4.) And the subsequent confirmation of the first mortgage of the commonwealth by the company, after all the important changes in location or in legislation were made, will render it valid as to the mortgagor also. So that nothing more need be said in regard to this first mortgage as a valid encumbrance upon the property and franchises of the company to the full extent of the $2,000,000.

3. But it may be more satisfactory to state more in detail the grounds upon which I regard this mortgage as good to the full extent.

(1.) It was executed by vote of the stockholders, as I understand, in full conformity with the act of 1854, by which this state aid was first granted, and with the requirements of the general statutes then in force. The statute then in force required rail-

[2] Crane *v.* Deming, 7 Conn. R. 387; Maroney's Appeal, 7 Amer. Law Reg. 169; Hoven *v.* Kerns, 2 Penn. St. 96; Parmentier *v.* Gillespie, 9 Id. 86.

[3] Coe *v.* Columbus, P. & Ind. Railw., 10 Ohio St. 372.

way mortgages to the commonwealth to cover the road, franchise, and property of the company, which this does in terms, the word income being added in the deed, which will not vary the construction materially. The statute also provided that such mortgages shall, as to all future claims against the company, "operate to cover and bind any lands included in the location of the road, the title to which or the easement upon which shall be thereafter acquired, and any additions which shall be made thereafter to the road, by labor, materials, or otherwise" (enumerating every species of property, real and personal, which ordinarily attaches to a railway), "as fully as if the road had been completed, and all said property acquired and owned by the corporation at the time of the execution of the conveyance." This seems to provide in terms for passing any different location which the company might afterwards adopt for their road. And it has been repeatedly held, that under a special authority for executing such a mortgage, all future acquisitions of the company will pass, both under the power, and as an incident to the principal thing conveyed. This was so decided in this state in express terms, and in a case where the mortgagees had not taken possession.[4] And the same principle was declared[5] in regard to accessions made to unfinished articles of manufacture mortgaged while in the process of being made. And in the United States Supreme Court the same rule has been applied to the mortgage of an unfinished railway, upon general principles and without any statute giving the power to mortgage future acquisitions.[6] And the same principle is maintained in England in the House of Lords.[7] It seems to me, therefore, that there can no longer be any question in regard to the title of the commonwealth having been impaired by any change in the location of the road. If it came within the powers of the company in regard to the right of deviation, or was subsequently confirmed by the legislature, it will pass under the mortgage; and if the company did not acquire it in one of these modes, it has not the protection of law for its continuance, and we need not spend time in regard to it.

[4] Howe *v.* Freeman, 14 Gray, 566.

[5] Harding *v.* Coburn, 12 Met. 333.

[6] Pennock *v.* Coe, 23 How. (U. S.) 117.

[7] Holroyd *v.* Marshall, 9 Jur. N. S. 213.

(2.) The rule so often declared in this commonwealth in regard to personal chattels, that they cannot pass by a deed executed before their grantor has acquired the possession of them, has no application to a railway structure, which is more like an unfinished building for manufacturing purposes, all future acquisitions to which, whether by fixtures or improvements, do pass under a prior mortgage, here and everywhere else. But if that rule should be held by the courts in this state to be binding, as to the future acquired personal accessions of a railway mortgaged, which I should question, as it is in conflict with the rules of equity-law in every other country where that law prevails, it could not affect a mortgage of future accessions of personal estate, when the mortgage was executed in conformity with express powers conferred by statute for that purpose, as in this case. That was the very point decided in Howe *v.* Freeman, *supra*. And the same principle is recognized in Seymour *v.* C. & Niagara Falls Railway.[8]

(3.) But it has been made a question by some, how far the alteration in the terms of affording this state aid produced by subsequent legislation, and especially in diverting a portion of it from the tunnel and applying it to the road, and in repealing some of the provisions of the act of 1854, which, by the terms of the first mortgage, were to form the basis of the conditions upon which the scrip should be issued by the state and expended by the company, may have postponed the lien of the state to that of after encumbrancers.

(4.) This might seem to be a question of more difficulty, if it did not appear from the nature of these changes that they amounted to nothing more than a relinquishment from time to time on the part of the commonwealth of such conditions in its favor as were likely to prove inconvenient to the company, or, what is the same thing, to the contractors to perform. And being so exclusively for their ease and advantage, and made at their instance, they could not affect the security of the commonwealth, so far as these parties are concerned, if they were more fundamental than they are.

[8] 25 Barb. 284, 309; Willink *v.* Morris Canal & Banking Co., 3 Green Ch. 402; Phillips *v.* Winslow, 18 B. Mon. 431; Pierce *v.* Emery, 32 N. H. R. 484.

(5.) But in any view, I do not apprehend they could imperil the security of the commonwealth. So far as the company is concerned, they have all been assented to and confirmed by the subsequent mortgages. And as to intervening encumbrancers, I do not conceive that they stand in the situation of a surety in the strict sense of the term, so that he can insist upon the very terms of the contract remaining unchanged. That is true of a strict surety. But that is upon the ground that the surety is upon the identical contract with the principal debtor, and if the creditor consents, by a valid contract, to change the first contract without the consent of the surety, he is released, because the creditor has relinquished the contract by which he was bound, and he is not obliged to perform any other, even though more favorable for his interests.

(6.) But that is not true of a subsequent mortgagee. He is not a surety to prior mortgagees. He is not a party to that contract, and is not obliged to perform it, unless the property is of more value than the prior encumbrances, and he wishes to apply the balance upon his own debt. He is then only a surety, conditionally, and at his own option. There is no privity of contract between successive mortgagees. The right of each successive mortgagee is subject to the burden imposed upon the estate by the prior mortgages, and there is a consequent duty imposed upon the prior mortgagees not to increase or essentially change the character of this burden. But even if this is done, without fraud, it will not defeat the entire security, but only to the amount of the increase or excess thus imposed. The cases are very numerous as to the right to change mortgage securities, without releasing the lien or encumbrance, as to subsequent encumbrancers. They will be found carefully digested in 2 Am. Law Reg. N. S. 1, where the rule was thus stated by me, before I knew of this case: "Where no actual release of the mortgage securities was intended, as between the parties, and no actual payment of the same has been made in the money of the debtor," notwithstanding any change in the form and nature of the securities, the amount remaining the same, "the mortgage will still be held a valid security."[9] And I have no doubt that this prop-

[9] Kinley *v.* Hill, 4 Watts & Serg. 426.

osition is fully sustained by the decided cases, and that it will reach changes of a much more radical character than any which have occurred in the present case. The substance of the thing is, and always was, that the commonwealth had a prior claim to any other for two millions of dollars. There has been no essential change in the substance of the thing, and all mere changes in the form and nature of the securities are unimportant. This has been settled in England for almost a century, and for many years in all the leading American states. And of this, subsequent encumbrancers have no equitable right to complain, as long as the burden upon the encumbered estate is not increased.

(7.) The form of the condition of the first mortgage in this case differed somewhat from the provisions of the statute, in regard to railway mortgages executed to the commonwealth. This was given to secure the performance of the bond, which was conditioned to save the commonwealth harmless for issuing the scrip, and to pay interest and principal as it fell due, and to expend the money, and in other respects to regulate their conduct according to the provisions of the statute of 1854, according to the requirements of which the scrip was to be issued. This was in effect "to secure a loan or debt owing or to become due from it to the commonwealth." It is certain it has proved so, and every one much acquainted with such transactions must have expected, at the time the mortgage was executed, that it would prove so. And this, I suppose, may fairly be regarded as the legal construction of the contract.

(8.) But whatever view any court might be inclined to take of this question, it is certain the mortgage is sufficiently legalized in this form by the statute of 1854, requiring it to be executed for this express purpose.

4. In regard to the importance and value to be attached to the subsequent mortgages executed to the commonwealth, little more, perhaps, need be said. The latest one does not seem to have been executed in pursuance with any vote of the stockholders, and if not, would not be a valid deed as to the corporation. The former one, although not indispensable to the title of the commonwealth under the first mortgage, was certainly convenient for them to have, as saving all question and all controversy

in regard to the validity of the first mortgage, and the extent and validity of the advances made under it. The precise nature and extent of their operation, both as to the company and intervening encumbrancers, has been before pretty fully explained.

5. We now come to the question of the validity of the mortgage to Smith and others, for the benefit of the contractors. The questions arising in regard to this are so numerous, and so difficult, and so wholly unsettled, at present, that I do not apprehend that any one can do much more than to suggest the questions likely to arise in regard to the matter and their probable solution, so as to enable the committee and the governor and council to act understandingly, in regard to possible as well as probable results.

(1.) In regard to the bonds, to secure the payment of which the mortgage was executed, it may be of considerable importance to determine whether they are valid as negotiable instruments, and so liable to be enforced against the company to the full extent of their nominal amount, without regard to the price for which they were sold in the market, or any other equities existing between the original parties, by which the nominal amount might be liable to large deductions or possible defeat. If these bonds are to be regarded as legally issued by the corporation, they are I understand in the usual form of such securities, and are strictly negotiable, so that they may be enforced against the company and all others having an interest in the property of the company of a later date than the mortgage by which these bonds are secured, if that deed is valid. This has been so repeatedly determined in this country that it is regarded as no longer open to question, notwithstanding the English decisions are the other way, having often held what they call railway debentures, which are the same kind of security as our railway bonds, not negotiable. And chapter 53, § 6 of the General Statutes make such bonds negotiable in this commonwealth.

(2.) The statute of this commonwealth, in regard to the issue of these railway bonds, required that they conform to certain provisions, among which are that they be payable at periods not exceeding twenty years from the date thereof, and to an amount not exceeding the capital stock actually paid in by the stockholders. And by this last expression I understand "paid in" in

money or its equivalent. Any other construction I should regard as an evasion and a fraud upon the law; and that has been often so held by courts of the highest authority.

(3.) The bonds in this case were made payable thirty years from date, and were to an amount three or four times more than the amount of the capital ever *bonâ fide* paid in by the stockholders. The bonds did not, perhaps, in all respects conform to other provisions of the statute, but these are the most unquestionable departures, and the latter point is the most material of any one. They will therefore test the validity of the contracts as well as more. And if it is considered that these provisions of the statute contain a virtual prohibition against railway companies issuing this kind of contracts, without complying with these requirements, there can be no question that these bonds are in conflict with the most favorable construction which could be given by the words of the statute, with a view to uphold them. And I confess, it seems to me very obvious that such was the intention of the framers of this statute. It seems to me an idle and frivolous construction of the statute to suppose that nothing more was intended than to direct in what form and to what extent these securities might be issued by railway companies and at the same time to leave it altogether optional with them whether to comply with the directions or not, and without intending to make any discrimination between bonds issued in conformity with the requirements of the statute and those which were not, in regard to their validity. I can scarcely convince myself that the legislature could have been induced, understandingly, to adopt a statute of no more importance than this construction gives to this. I must conclude then, and for myself have no question, that the proper construction of this statute is that it contains a virtual limitation of the powers of railway companies to those specific requirements, in issuing these negotiable bonds.

(4.) I am fully aware that it is possible to take another view of this question, and one which will uphold the validity of these thirty year bonds, issued for many times more than the statute allowed. There is undoubtedly a general right in these business corporations, resulting from the express terms of their charters and the implied necessities of their organizations, to execute any contracts needful or necessary for carrying their powers into

effect in the ordinary mode. And the express power to contract, with the implied power to execute such classes of contracts as are usual in similar business operations, will, no doubt, extend to the execution of contracts under seal, and contracts not under seal. In other words, railway corporations, as the business of construction, equipment, operation, and repairs is now conducted, may perhaps execute bonds, bills of exchange, and promissory notes. But this has been very much contested in England, and the decisions in regard to what particular corporations may issue bills of exchange, have not marked out any very clear rule there, unless it be that *prim facieâ* such corporations cannot issue negotiable securities, unless there is some provision to that effect in the charter of the company or in the general laws touching the matter, or unless the nature of their business, as defined in their charter and the general laws, is such as to indicate a necessity, or at all events an important convenience, in the use of such instruments. And this I think is the true rule upon the subject, and the one sustained by the weight of present authority, and which must ultimately prevail.

(5.) To apply this rule to the present case, it should be borne in mind that the general laws of the commonwealth as to railway corporations, or any other corporations, are to be regarded as virtually forming a part of the charter of each company, and the powers of the company are to be judged of as if the provisions of these general laws were specifically repeated in each particular charter. I could have no doubt then that the provision of the general statutes in regard to these bonds, if it had been found in the charter of this particular company, would convince every one that it was intended to fix the only mode of issuing these securities, and that the company would have no power to issue them in any other way, whatever might have been the power of the company in this respect without any special provision on the subject. But this is only another form of stating the effect of such general legislation. It has been a thousand times decided, and every one understands, if he is at all experienced in the law of corporations, that the general laws of the state form the fundamental or organic laws of all corporate life or action, and that their force is precisely the same as if they had been re-enacted in the grant of each particular charter. And we might state

here the reason why the commonwealth might choose to make a special limitation upon the powers of corporations in regard to this species of grant or security. The transaction here contemplated, on the part of railway companies, is essentially different from that of issuing bills of exchange or promissory notes, or any other form of security which has reference to a single transaction or emergency. The thing here provided for, and which was made to apply to all railway corporations in the state, was the creation of funded capital, in addition to the ordinary stock capital, and which was expected to remain for such length of time as should be necessary for the exigencies of the company, and at the same time was not so long as permanently to change the character of the corporation or the interests of the shareholders. This transaction was something very important to the fundamental character and powers of all railway companies in the state. And whatever views the legislature might have entertained of the general powers of such corporations in regard to issuing bills of exchange and other negotiable securities, it was very natural that they should understand, as I have no doubt they did, that they would not, upon general principles, be regarded as clothed with the implied power to increase their capital at will in this mode.

(6.) A limitation was therefore very naturally and properly placed upon this proceeding, and its true boundaries defined: —

1. In providing that it should only be done for the purpose of funding their floating debt, and for borrowing money for purposes authorized by law.

2. That the entire fund thus added to the capital of the company should not exceed the capital stock actually paid in, or in other words, that the funded capital thus added should not exceed the actual working-stock capital of the company.

3. That the security representing this funded capital should not be in sums less than one hundred dollars, should not extend the time of payment beyond twenty years, or bear a rate of interest above six per centum.

(7.) The powers of the company are thus clearly defined, and it seems to me that these provisions must be understood as containing an implied denial of the right or the power of this kind of corporations to issue this class of securities for any other pur-

pose or in any other form. I must conclude, then, that the bonds in this case, not being issued in any essential particular, in conformity with the powers of the company granted for that purpose, are strictly *ultra vires* as to the company, and of no binding force.

(8.) But as these securities are of a negotiable character, and may very probably have gone into the market, and may now be in the hands of *bonâ fide* holders to an amount far beyond what the contractors had the right to use by the terms of the contract, it may be important to consider how far these securities can be held binding, either upon the company or upon prior encumbrancers, in the hands of *bonâ fide* purchasers. It is well settled in England, and, as it seems to me, upon satisfactory grounds, that even negotiable securities, issued by corporations beyond their powers, or *ultra vires* as it is called, can have no binding force in the hands of any one, however fairly obtained or fully paid for. It is in effect the same as the negotiable security with the name of a natural person, which was forged, or subscribed by some person claiming to be his agent, but having in fact no such authority. Those who take even negotiable paper in the market, if not bound to inquire into its consideration, must look at the title of the person from whom they take it, and know that it was properly executed in the first instance, and that it has been regularly transferred. This has been expressly decided with reference to a bill of exchange issued in the name of a public company, which had no power to issue such securities for that purpose when the defect of power appeared on the face of the bill, or was known to the party.[10]

(9.) In the present case these securities may be in the hands of many persons not cognizant of the fact that they were issued for a purpose unauthorized by law. But on the face of the bonds it appears that they were issued for a term of years not authorized by the general powers of the company. And any person taking even negotiable securities upon the credit of any corporation which is a party to it, must at his peril learn the powers of the company, whether they depend upon its charter or the general laws of the commonwealth, before he can be said to

[10] Balfour *v.* Ernest, 5 Jur. N. S. 439.

have exercised due caution in giving credit to the paper on the responsibility of the company.[11]

(10.) I conclude, therefore, without hesitation, that these bonds are void securities in the hands of all persons, both as against the company and prior encumbrancers. And this might seem to have effectually disposed of the Smith mortgage, and upon grounds satisfactory to most minds, since, if the bonds were of no validity, the mortgage given for their security and payment could scarcely be more valid. I was at first myself inclined to adopt this view as entirely satisfactory, and I still believe that it is so. But I have deemed it proper to suggest another plausible view which has occurred to me as the only possible ground upon which an argument can be maintained in favor of the Smith mortgage-security.

6. It is not improbable that it may ultimately be claimed by the parties interested in this Smith mortgage, that it was intended more as a security for the debt of the contractors than for the bonds issued on that account, and that the mortgage may be upheld as a security for the benefit of the contractors, without regard to the validity of the bonds. It may, therefore, be prudent to examine the subject in this view.

(1.) It is certain that the substance of all mortgage securities is the assurance of the payment of the debt, and that this will not ordinarily be affected by the particular form in which the securities were originally drawn, nor by any subsequent change in the securities, so long as the debt remains unpaid, provided the debt be sufficiently identified in the deed.

(2.) It is apparent that the courts have not treated contracts which have been attempted to be executed by corporations, but which prove beyond their powers, or *ultra vires*, as tainted with any such illegality as attaches to contracts, the object and purpose of which involve legal turpitude, which includes all contracts whose basis or consideration rest upon that which is either *malum in se*, or *malum prohibitum*, i. e. which is either in contravention of morality and decency in general, or against the requirements of any positive statute. This subject is extensively discussed in a late case in the New York Court of Appeals.[12] We

[11] Balfour *v.* Ernest, *supra*, *Willes*, J.

[12] Bissell *v.* Mich. So. & N. Ind. Railw., 22 N. Y. R. 258. So, also, in Parish *v.* Wheeler, Id. 494.

might refer to a large number of cases, English as well as American, where this subject has been lately discussed by the courts. The tendency everywhere now is not to regard the contracts of corporations which fail merely for want of power in the companies to execute them, and which contain no intentional or inherent vice, as tainted with any such illegality as will defeat other contracts, merely becausejo ined with such contracts as are *ultra vires*. And on this ground it may be claimed, perhaps, with some degree of plausibility, that the mortgage executed in connection with these bonds, is not rendered invalid by their failure, provided it can be fairly construed as intended to secure the debt to the contractor as well as the bonds.

(3.) I should myself very much question whether the courts will ever be inclined to listen favorably to any such construction of this mortgage. For although the contract with, and the debt to, the contractors are sufficiently recited in the mortgage, it is not executed in the name of the contractors, or in terms to secure anything but the principal and interest of the bonds; and it is certainly a very liberal construction to apply the security not only to the original debt for which the bonds were given in payment, but for the benefit of a party not named in the deed except incidentally, and as ultimate *cestui que trust.*

(4.) And I cannot convince myself that if these bonds were got up between the company and the contractors, as much in contravention of the true spirit and purpose of the statute, as I have already indicated that it seems to me they were, the courts of the commonwealth will extend to the mortgage any such favorable construction as will be required to uphold it. I should expect if the courts construe that portion of the law as I do, that they will say that these parties were bound to understand that the whole scheme of these bonds and of the mortgage for their security, as a formal addition of funded capital to the regular stock capital of the company, can be regarded as nothing less than an attempt to evade the law, and defraud the stockholders, if there were any *bonâ fide* such. If the courts take the view of the subject of the bonds which I do, they will most unquestionably say that the mortgage must perish with the bonds.

(5.) But if they should be induced to adopt the more favorable construction, and to uphold the mortgage as a security, in

the names of the trustees, for the benefit of the contractors, it will stand the same as if it had been so expressed originally, and the bonds had never been issued. It will then stand as a security to the contractors for that portion of the contract represented by the $900,000, as fast as the work progressed. In other words, this mortgage, if in other respects valid, will be construed as a security for such proportion of the $900,000 as the work already done by the contractors bears to the whole work.

(6.) There is one English case[13] where a somewhat similar construction was adopted in favor of the mortgage of a corporation. The statement of the case, in the language of the learned judge, *Sir John Romilly*, M. R., will show the analogies to the present case. "The deed recites the execution of works by the plaintiffs, that a sum not exceeding £5,000 was due from the company to the plaintiffs, and that bills of exchange were given for the £5,000 and the interest. Then it witnesses that the mortgage was given for securing the said principal and interest money at the maturity of the bills of exchange. It is therefore in fact a mortgage to secure the payment of the £5,000 and interest, and not the bills of exchange. It is true, the proviso is, on payment of the bills of exchange as they fall due." It turned out that the company had no power to issue bills of exchange, and they were therefore void against the company, but this was not understood by the mortgagees when they accepted the mortgage. The court held, that notwithstanding the bills were void as being *ultra vires*, the mortgage was a valid security for the debt due the mortgagees for the construction of the works of the company.

(7.) And in this view of the subject there will be nothing of a negotiable character belonging to the mortgage, but it will be solely under the control of the contractors, as much as if it had been executed in their names only. And the acts and deeds, or other contracts of the contractors, will qualify, control, or postpone this Smith mortgage, unless some other party has acquired an interest under it, and given notice of such interest to the company and to all holding prior liens upon the property, of which I have not heard.

(8.) It will be requisite in this view to inquire into the right

[13] Scott *v.* Colburn, 5 Jur. N. S. 183.

or power of railway companies to execute a valid mortgage without legislative sanction expressly given for that purpose; and, if that power exists, to what extent.

(9.) In England it seems well settled that a railway corporation, without legislative authority for that purpose, cannot enter into any contract of lease, mortgage, or sale, with any person, natural or corporate, which contemplates the transfer of the possession of their road, either presently or in any future contingency, contemplated and provided for in the contract. This, I think, is the true rule upon the subject, and the one which will be likely ultimately to extend everywhere, so far as the principles of the common law of England governing corporations extend; and that is pretty generally throughout the United States.

(10.) But it is not, by this rule, indispensable that such legislative sanction should have been had in advance of the execution of the contract, or that it should be given in express terms. It will be sufficient if given in confirmation of an existing contract, executed without any such authority, or if it be the result of reasonable implication, either from the course of legislation upon the general subject or from the special provisions of any particular statute.

(11.) And it has never been made a question anywhere that a railway company, like any other business corporation, might create a valid lien by way of mortgage upon its property, real and personal; and that where a corporation has the franchise of taking tolls, such mortgage might be so made as to create a prior lien upon such tolls, and all this might be done under the general powers of the corporation, and would be carried into effect by a court of equity, either through the officers and agents of the corporation by making them its receivers for that purpose, or else by the appointment of other receivers. That seems to be recognized in the case of Shaw *v.* Norfolk County Railway,[14] the only case where this question has arisen in this commonwealth. *Merrick*, J., there said: "If any question could ever have been supposed to exist in regard to the transfer of the franchise, there certainly could have been none concerning the conveyance of the land and personal property." And to give the convey-

[14] 5 Gray, 162.

ance of the property of the company any reasonable operation, it must be treated in equity as creating a lien upon the tolls or earnings of the company, to be secured by putting the works temporarily into the hands of a receiver, acting under the orders and control of a court of equity.

(12.) This, I think, was the general view held by the courts and profession in this country at the date of this mortgage. And I am not prepared to say it is not sound, though attended with some difficulties and embarrasments in the detail. But in the period which has elapsed since that time, some of the American states have gone so far as to say that a railway company, without legislative authority, cannot create any valid lien upon its road-bed and superstructure.[15] The tendency of recent decisions in this country is certainly in that direction, and I have rather thought it might ultimately prevail throughout the country, although not fully convinced of its soundness.

(13.) But it seems to me, at the date of this mortgage, if its validity should ultimately be made to depend upon the power of railway companies in this commonwealth to execute such contracts, that there was some good reason to consider that the existing statutes did virtually recognize such a power.

1. There has existed in this state for many years a statute,[16] by which the franchise of a turnpike or other company for the taking of tolls, and all the rights and privileges thereof shall be liable to attachment on mesne process, and by other sections, it is provided that the same may be sold on execution, and that the officer's return of the sale shall transfer to the purchaser all the privileges and immunities which by law belonged to the corporation, so far as relates to the right of demanding tolls. I think it can scarcely be claimed that the class of corporations included under these provisions may not mortgage their property and franchises to the same extent to which they are made liable to attachment and sale on execution. And although this provision may not include railway companies in terms, it certainly is not very obvious why any distinction should be made in this respect between turnpike and bridge corporations and railroads, since all the early railway charters in this state contained the express

[15] Coe *v.* Columbus, P. & Ind. Railw., 10 Ohio St. 372.

[16] General Statutes, ch. 68, § 25.

provision that any other company might run its carriages upon the road, by paying a specified or reasonable toll, to be fixed for that purpose. And the General Statutes, on the subject of railroad corporations,[17] provided that each corporation may establish, for its sole benefit, a toll upon all passengers or property conveyed or transported on its road; so that railways are literally companies authorized to take toll, and it is not improbable that the courts may regard this statute as making their franchises liable to levy of execution. If so it would seem it must be subject to being mortgaged by the company to the same extent. I know that the statute already cited may be, not improperly, so construed as to limit its application to other companies authorized to take toll, in the same way turnpikes do, for the use of their road for the passage of carriages owned by the persons paying such toll, and thus be held not to include railways. This is not an unusual construction of statutes to limit the application of general words to kindred objects, as those *ejusdem generis*. And judging from the more common mode of construing statutes by the courts here, and the general impression of the profession in regard to the extent of the statute now in question, I should rather expect it to receive this limited application. But in any view, this statute must be regarded as dealing with this class of property in such a manner as to show that it is regarded as alienable for the security or payment of debts.

2. But I am still more confirmed in this view by another provision of the General Statutes on the subject of railroads. It is provided[18] that when a railway company shall have issued bonds in the manner before pointed out, it shall not subsequently execute a mortgage upon its road, equipment, or franchise, or any of its property, real or personal, without including in and securing by such deed or mortgage all bonds previously issued and all pre-existing debts and liabilities of the corporation. The latter section provides how the property shall be managed when any such mortgage is executed.

3. These provisions proceed, I think, upon the assumption that such a mortgage may be executed at any time, under the general powers of railway companies. It could only be made a

[17] Ch. 63, § 112.

[18] Gen. Stats., ch. 63, §§ 123, 124.

reasonable provision by regarding it as a limitation upon the mode of exercising a power already existing in railway corporations. It would be absurd to suppose that it was intended to limit special powers thereafter to be obtained from the legislature, either by special act or in the charters of future corporations.

4. The uniform course of legislation undoubtedly is to leave restrictions upon powers which can only be obtained by special act, to the discretion of the legislature at the time of granting them. This is the only reasonable or respectful course, and the only construction which I should expect the courts of this commonwealth ultimately to adopt.

5. I should therefore consider that the general course of legislation upon the subject in this commonwealth had recognized the right of railway corporations to create mortgages upon their "roads, equipment, and franchises."

(14.) But if the courts should hold, as very probably they may, that there is no general power to be implied from the legislation of the state for railway companies to mortgage their franchises of operating their roads and taking tolls, then the mortgage is good, at most, only as creating a lien upon the property. And if the courts of this commonwealth should apply the rule upon this subject which they have hitherto manifested a very strong inclination to apply to all mortgages of personal property, as between natural persons, the mortgage could only operate upon the road-bed and its accessory fixtures, and such personal estate as the company had at the date of the deed. And as the location of almost the entire road has been changed since that time, the mortgage could only hold that portion of the road-bed which remained unchanged, with its accessory fixtures.

(15.) But even this may, if valid, and I do not see but it must, entitle the parties interested under this mortgage to redeem the whole road, and hold it until they are reimbursed their own debt, with all sums paid by them to prior encumbrancers, so that the commonwealth will have to treat this Smith mortgage as a valid subsisting encumbrance, either upon the road-bed, or else upon the whole structure, with all its accessories of real and personal estate, unless it is invalid upon the first ground suggested by me. And I am decidedly of opinion that it ought to be regarded as in-

valid upon that ground, and that it probably will be so regarded by the courts. But as the questions are entirely new, and have not been argued by counsel, I could not feel perfect confidence in such a conclusion.

7. In regard to what other liens or encumbrances exist on any of the property claimed by the commonwealth under its mortgages, &c., I may be very brief. I have not been informed of any which are claimed to exist, except the attachment upon the iron as the property of Haupt & Co., the contractors, and the attachment in favor of Mr. Bartlett.

(1.) The validity of the attachments upon the iron will depend upon the question, whether the title to the iron had vested in the railway company. I have spent less time upon this question from the view which I have taken of another question suggested by the committee, which it will be perceived renders this of comparatively little consequence. But it seems to me that it must be considered that the title to the iron had sufficiently vested in the railway company for them to hold it as against the creditor of Haupt & Co.

(2.) For it cannot be doubted that the title had vested in Haupt & Co. The very attachment by the Rensselaer Iron Company, from whom the contractors purchased it as the property of Haupt & Co., would be an effectual waiver of any claim they might have as vendors against Haupt & Co., on the ground of a lien for the price, and that the title still remained in them. And considering the title as having fully vested in the contractors, their negotiations with the state engineer and the commonwealth through him, must be regarded as negotiations with the company for the purpose of acquiring the title, in order to secure the commonwealth for the scrip to be advanced upon it. In this view, it seems impossible to question that Haupt & Co., did sell and take pay for the iron, under the express agreement that the title should pass to the company in the present tense, and that they should accept the commodity in the place where it then lay deposited, upon the grounds of a neutral party. This being so, it would no longer be the property of Haupt & Co., and their attempt to hold it by virtue of these attachments against themselves would be not only illegal but fraudulent. It is true that the creditors would not be injured by any fraudulent acts of

Haupt & Co., but they would be bound by their acts in transferring the title, and accepting payment for it. I should feel no doubt, then, that these attachments, if tested by judicial process, will prove of no validity as far as the property is concerned.

(3.) But I may here consider the question suggested by the committee, whether the act of 1862[19] has not provided for the payment of these very claims and the discharge of these attachments, to the extent of the appropriation made for that purpose. From all the facts which have been made known to me, I have not been able to give the statute any other construction than that it was intended to reach all claims, either against the company or the contractors, for labor, materials, or land damages, which had *bonâ fide* gone into the construction of the road or its equipment, and which had not been paid for. This will then extend to this iron, after it is put into a position to go into the road. And upon dissolving the attachment, I suppose it will come into that position.

(4.) But of course these claims cannot be paid except to the extent of the appropriation. And as the claims for land damages constitute a valid lien upon the roadway against the company and all encumbrancers, unless such lien has been legally released, those claims will probably have to be paid in full, and the remaining claimants must be contented to receive such a dividend as the proportion which the whole appropriation bears to the whole amount of the claims will allow, and release the whole of their claims, which they will no doubt gladly consent to do. But this construction of the act is only of the first impression, and with very imperfect knowledge of the minute details of the facts. But I have seen or heard nothing which inclines me to doubt that it is correct. If so, it renders the validity of the attachment of no importance. But if the whole question turned upon the validity of the lien created by the attachment, I should feel compelled to advise against its being so treated.

(5.) In regard to the claim of the Connecticut River Railway Company for freight upon this iron, I could not advise very confidently, without learning the facts more minutely. But as the claim is small, and probably meritorious, it would very likely

[19] Ch. 156, § 3.

come within the equity of the other claims, and I suppose it has been allowed as such, and will be paid if the others are, and in the same proportion. There is no doubt of the lien of carriers of goods for the freight of those particular goods, but not upon what remain undelivered for the general balance of freight accounts, without a contract to that effect. And an agreement to give credit for freight, or delivery of the goods without its payment, will be regarded as a waiver of the lien. My impression is, that if the facts are carefully sifted, there will prove to have been no lien upon this iron for the freight. The agents of the railroad seem to have consented to have Haupt & Co. treat it as not only delivered to them, but to the company, for the benefit of the state, and to let it remain upon their land for that purpose. And a portion of it was actually removed to the lands of the company, and laid in places convenient for attaching it to the superstructure of their road. I should presume, under these circumstances, that, as against the company or the commonwealth, the carrier's lien would be regarded as waived. But it will probably be paid its proportion of the appropriation.

(6.) I cannot say how far the provisions of the act of 1863[20] were intended to apply to any liens upon this iron, by attachment or otherwise. The provisions of this section are very general. It might apply to all claims or encumbrances upon any portion of the road and its property. I think it highly probable that the legislature, both in 1863 and 1862, expected the liens upon this iron, whether real or pretended, to be paid or compromised by the commissioners, under the advice of the governor and council. This I have said in answer to a special inquiry.

8. (1.) There is no doubt that the second mortgagees, if any such legally exist, may redeem the encumbrance in favor of the commonwealth, at any time before their rights are absolutely foreclosed. From what has already been said, it will be obvious that I should have no great doubt they must, in that event, pay whatever had been paid by the commonwealth, within the limit of two millions of dollars, and that up to this point the commonwealth would be protected in expending money upon the road or tunnel. And as this Smith mortgage can only be upheld for the benefit of the contractors on the most favorable view, and the

[20] Ch. 214, § 5.

commonwealth have no knowledge of an assignment of that debt which might create an equity in other parties, the deed of the contractors, consenting to the surrender and postponing their claim until all the advances of the commonwealth, whether made before or after, are paid, must be regarded as binding upon the second mortgagees, they being mere trustees for the benefit of the contractors.

(2.) In this view, and I have no doubt of its soundness, the second mortgage, as a legal security to the contractors for any sum due them (and it is of no validity in any other light), seems to be postponed, not only to all sums then advanced by the commonwealth, but to all which should be thereafter advanced by them, and this would postpone the Smith mortgage not only to the $2,000,000 secured by the first mortgage, but to any sums which it was fairly to be presumed the commonwealth might have to advance, judging from reasonable probability at the time the road was surrendered, and this would seem to extend to the completion of the road and tunnel, since the deed of the contractors, consenting to the surrender, is made with reference to the surrender itself. And that instrument seems, by implication certainly, to contain a binding consent on the part of the company that the commonwealth may proceed to complete the entire road and tunnel, and that the company only reserve the right to redeem within ten years after the road is completed, and put in operation, by paying, of course, all sums advanced by the commonwealth, and interest thereon, deducting the net earnings of the road.

(3.) And if the company are thus bound by their surrender to allow the commonwealth to go forward and complete their road, I do not see why the contractors, by their deed consenting to the surrender, are not bound to the same extent. And if so, I think it will dispose of the Smith mortgage in every view as an impediment in the way of the commonwealth going forward, if they deem it expedient, and finishing the road and its equipment. It is true the title of the commonwealth will be only that of a mortgagee in possession, and they will always be liable to be called to account, either by the company, or by the second mortgagees if their title is of any validity, until those interests are foreclosed, which cannot, in the present juncture of affairs,

well be effected until ten years after the road is completed. This is in response to special inquiries of the committee.

9. In regard to the attachment in favor of Mr. Bartlett being valid as a lien upon the franchise of the corporation, which I suppose was intended, though I have not the return of the officer, that will depend upon the question how far railways are to be regarded as coming within the statute already alluded to, and that depends in great part upon the same considerations which have been already commented upon. The existing statutes, in regard to creditors attaching on mesne process, and reaching on execution any interest in real estate, either equitable or legal, would enable, I should suppose, creditors to reach any property-interest of railways which it would be in the power of such corporations to assign or transfer for the benefit of creditors. And whether the general statutes of the commonwealth, or those in regard to levying upon the franchises of corporations for taking tolls, should allow of creditors taking this interest in railway companies; or they could assign or transfer this interest by way of mortgage or assignment for the benefit of creditors, or not, the other franchises and responsibilities of the corporation, both public and private, still remain as before. This is so held in Commonwealth *v.* Tenth Mass. Turnpike Co.[21]

10. Considering, then, the mortgage in favor of Smith and others, and the attachment in favor of Mr. Bartlett as possible, clouds upon the title of the commonwealth in the nature of subsequent liens, and that is the most which can be said in their favor; the question arises, whether the opinion of the Supreme Judicial Court should be invoked in regard to the questions involved. There is no doubt that would be exceedingly desirable if it can be readily obtained.

(1.) But I should not expect the courts would regard this transaction as coming within the range of those questions which the executive or legislative branches of the government may properly refer to their determination, for the assistance of those departments in the proper discharge of their own duties. This is more in the nature of an ordinary question of adversary pecuniary interests than any question I have ever known to be determined by the court in that way.

[21] 5 Cush. 509.

(2.) In looking at the provision[22] of the Constitution, by which it is provided that each branch of the legislature, as well as the governor and council, shall have authority to require the opinion of the Supreme Judicial Court upon important questions of law and upon solemn occasions, there would seem to be no great doubt that the present case presents both of the contingencies, in which it is provided that the opinion of the Justices of the Supreme Judicial Court may be required, unless there is something else in the case which takes it out of the class in which it is proper to proceed in that mode. These questions of law are more numerous and more important than will ordinarily occur in any one case; and the occasion is more grave, so far as mere pecuniary interests are concerned, than commonly arises. And the enterprise involved embraces questions, in the opinion of many certainly, more serious than the mere pecuniary interests at stake.

(3.) These considerations will weigh very seriously with that tribunal, in inducing them to meet the emergency with reasonable disposition to relieve all embarrassments as far as possibly in their power, in whatever form the questions are brought before them. The section in the Constitution referred to unquestionably has primary reference to matters of public concern. But many such also involve private rights and interests to a very large extent. And the justices of the Supreme Judicial Court have on many occasions responded to applications for opinions from the executive and legislative departments where questions of private right have been largely involved. This point, I find, has been felt and discussed by the justices on former similar occasions, and opinions nevertheless given with the protest that they were not to be regarded as binding upon the private rights of persons involved.[23] Such an opinion, if not binding upon the parties, would fail to meet the emergency here.

(4.) How far the Supreme Judicial Court, as a Court of Equity, might be disposed to hear and determine these adversary rights and claims, with a view to enable the commonwealth, as a mortgagee in possession, to go forward safely and expend money in the completion and equipment of the road, can only be deter-

[22] Ch. 3, § 2.

[23] 9 Cush. 604; 5 Met. 597.

mined on application. There are many circumstances peculiar to this case, which might fairly be thought to have considerable weight in inducing the court to entertain such an application, at least to the extent of declaring that the commonwealth be allowed to go forward and finish the road and put the same in operation, and that for their advances for this purpose they should have the prior lien upon the road and equipment.

(5.) And there is great reason why the extent of all these adversary interests should be determined in advance, in order to enable all parties to act understandingly in the matter. And there is one statutory provision which might seem to favor such a preliminary application to the court.[24] The committee, or the governor and council, will be able to judge of the propriety of instituting such an application. It seems to me so desirable to have these adversary rights determined now or soon, and that this case is so peculiar that the court, if made fully to comprehend the importance of a preliminary decision, would be likely to listen to such an application. But of course such an opinion is rather based upon conjecture than knowledge.

(6.) Should the commonwealth determine to proceed to any expenditure upon the road or tunnel beyond the amount of two millions, without such a previous application to the court, it would certainly be desirable to notify the trustees and contractors interested under the second mortgage of such purpose, and that, if the second mortgagees object to such a course under a claim of a prior lien to such expenditures, in the completion of the road and its equipment, they will be required to lift the encumbrance of the commonwealth, or devise some method by which the road can be completed, or made available in its unfinished state; and that, in default of such action on the part of the second mortgagees, the commonwealth will proceed to finish and put the road in operation, and insist upon their advances for that purpose being regarded as the first encumbrance upon the road. This should be done, if at all, in such a form as not to recognize the second mortgage as any valid encumbrance, but to save all questions of priority of right, in the event that it should be regarded as of any validity. And the same course might be pursued in regard to the attachment, if that claim should be in-

[24] Gen. Stats., ch. 134, § 49.

sisted upon. That will of course be subject to all the mortgages if it should be regarded as of any force.

(7.) In regard to the right of the commonwealth to finish the road and insist upon holding the prior claim to it to the full extent of all their advances, perhaps nothing more need be said. Upon general principles such advances, made by a mortgagee in possession, by way of permanent erections, would not be a valid claim even as against the mortgagor. But necessary repairs are a valid claim both against the mortgagor and subsequent encumbrancers. And permanent erections made by consent or acquiescence of the mortgagor and subsequent encumbrancers, or while they lie by and do not object to such erections being made, are also a valid prior claim upon the estate. And in one case, where the estate consisted of a building-lot, which was unproductive, a dwelling-house, erected at a cost of $5,000, was held a valid claim on the part of the first mortgagee in possession.[25]

(8.) And in the present case I should expect a court of equity, if it made any decree in advance, to direct that unless subsequent claimants removed the claim of the commonwealth in some short and reasonable time, to be fixed by the court, they be allowed to proceed and put the road in operation, and hold a prior claim upon all the property, real and personal, for their expenditures in that behalf. And if that course were pursued by the commonwealth, by giving notice to all subsequent claimants, without obtaining any previous order from the court for thus doing, and subsequent claimants should afterwards succeed in establishing a right to redeem from the commonwealth, I should entertain no question they would be required to pay all sums advanced by the commonwealth in order to render the property productive.

(9.) I am not aware of any case in this state where the courts have decreed a foreclosure except that of Shaw *v.* Norfolk County Railway,[26] and it does not very clearly appear, from the report of that case, how it was finally disposed of by the court. But the court did then decree a foreclosure, and it became absolute, unless it was redeemed by the company. It does not appear that there was more than one mortgage in that case.

[25] Montgomery *v.* Chadwick, 7 Clarke (Iowa), 114.

[26] 5 Gray, 162.

NOTE II. TO §§ 235, 237, *ante*, pp. 507, 598.

Mortgages and Debentures. — Receivers and Managers.

§ 261. IN the case of the debentures of the London, Chatham, and Dover Railway Company, the Lords Justices in the Court of Chancery Appeal have just made a decision in the case of Gardner *v.* that company, 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 repayment 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, 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.

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.

We insert, for the information of the profession, at length, 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 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."

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.

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 sometimes 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.

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:

"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 1st 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."

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 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.

"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 of Pott *v.* Warwickshire Canal Company, 1 Kay, 142, and De Winton *v.* Mayor of Brecon, 26 Beav. 533, 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 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 assign-

ment 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 M. & G. 104, were held to mean that the bond-

holders 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.

"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 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 undertak-

ing 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.

"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. *Primâ 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 costs of this motion also, both before the Vice-Chancellor and here, ought, I think, to be costs in the cause."

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Cambridge: Printed by Welch, Bigelow, & Co.